No. 979

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE STANDARD MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, ENGLAND (A CORPORATION),

Plaintiff in Error,

vs.

NOME BEACH LIGHTERAGE & TRANSPORTATION COMPANY (A CORPORATION),

Defendant in Error.

FILED
DEC 18 1903

Brief of Plaintiff in Error.

Error to the Circuit Court of the United States for the Northern District of California.

VAN NESS & REDMAN,

Attorneys for Plaintiff in Error.

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THE STANDARD MARINE INSURANCE COMPANY, LIMITED, of Liverpool, England (a corporation), *Plaintiff in Error,* *vs.* NOME BEACH LIGHTERAGE AND TRANSPORTATION COMPANY (a corporation), *Defendant in Error.*	No. 979

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

In April of 1900, defendant in error dispatched the barkentine "Catherine Sudden" from San Francisco to Nome, Alaska, laden with a miscellaneous cargo shipped by various parties in San Francisco and consigned to various persons at Nome. The vessel was owned by defendant in error. Laden upon her, and belonging to and shipped by defendant in error to itself, was a miscellaneous assortment of merchandise and a lighterage

plant (for use at Nome) consisting of a steam launch and two lighterage scows.

May 2d, 1900, plaintiff in error issued to defendant in error its policy of insurance covering upon the consigned merchandise of the latter $5,250 and upon its lighterage plant $3,000. The policy provided that the risk thereunder was "to cease at ship's tackle, or thirty days after arrival at destination"; that the adventure upon the insured property or interest should begin "from and immediately following the loading thereof on board said vessel at San Francisco, as aforesaid, and so shall continue and endure until thirty days after arrival or at ship's tackle at Cape Nome aforesaid." (Trans., p. 18.)

In accepting the policy the defendant in error engaged for itself, its factors, servants and assigns "to sue, labor and travel, and use all reasonable and proper means for the security, preservation, relief and recovery of the property insured, or any part thereof; and also to use all proper and legal means to recover, through general average or otherwise, from the parties interested in Vessel, Freight or Cargo, either or all, any sums due the property insured or its owners, on account of sacrifices, losses or expenses incurred for the general safety or the common good." To the charges, if any, so incurred the underwriter agreed to contribute in proportion as the sum insured was to the whole sum at risk. (Trans., p. 19.)

Touching the liability of plaintiff in error in the event of loss, the policy provided that all merchandise not excepted under the memorandum clause was warranted by the insured free from particular average and partial loss,

unless occasioned by stranding, sinking, fire, collision, or other extraordinary peril insured against, and amounting to fifty per cent. or more on the sound value of the whole shipment at the port of delivery, and that such loss should be settled on the principles of salvage loss with benefit of salvage to the insurer. (Trans., p. 20.) To make the case one in which, in view of this warranty, a recovery could be claimed, defendant in error alleged an actual total loss.

The complaint alleges that while the "Sudden" was proceeding upon the voyage, the whole of the insured merchandise and the lighterage plant were lost by perils of the sea, to the damage of the defendant in error in the full sum insured. The story of the so-called loss is set forth in the testimony of Captain Panno (Trans., p. 265 *et seq.*), and is subtantially as follows:

The "Sudden" sailed from San Francisco (April 28th, 1900) under the command of Captain John Panno. About June 1st she went through the Unimak Pass and into the Behring Sea. Within from two to three days after getting out of Unimak Pass ice was sighted on the lea beam. The sea was full of ice, some of the pieces about level with the water and some of them eight or ten feet high. The vessel was sailed right on and into the ice, at times surrounded and shut in, and then, as the ice broke away, making her course through open leads in ice ahead. The vessel was not sheathed or otherwise specially prepared to encounter ice. Struggling to make her way through one of the leads, she struck against the ice, and her port bow was stove in. Captain Panno signaled for help, and two vessels

then within hailing distance, the "Richardson" and the "Pitcairn," came to his assistance. With a view to lightening the "Sudden," the "Pitcairn" and "Richardson," with the consent of Captain Panno, took out of the "Sudden" and removed to the "Pitcairn" and "Richardson" about ten tons of stuff, principally provisions. The bulk of this was taken from the insured shipment of defendant in error. The next day the steamer "Corwin" came along, and undertook to get the "Sudden" and her cargo out of the ice and into Nome. Captain Panno made no arrangement with them concerning the salvage service to the vessel, and none concerning the cargo, except the insured lighterage plant. As to this, the cost of the salvage service was fixed at $2,500, and pursuant to the agreement then effected the launch and lighters were delivered at Nome to defendant in error.

Defendant in error was represented at Nome by one Morine, who, as its agent, had general charge of its business. Prior to the time of the arrival of the "Corwin" with the "Sudden" and her cargo and the launch in tow, Morine had been ill. Anticipating his inability to look after the interests of defendant in error, Morine had appointed one Omar J. Humphrey to take charge of the vessel and cargo, and otherwise, in connection therewith, to represent defendant in error. Humphrey accepted this appointment, and did upon the arrival of the "Corwin" and her tow, take upon himself the representation of defendant in error in all particulars connected with that business. He arranged for the payment of the $2,500 stipulated to be paid for the salvage of the lighterage plant, and took possession of the latter. Under

date of June 11th, 1900, Humphrey, writing as the agent of defendant in error to Mr. Pennell, Secretary of defendant in error, advised the latter of his appointment by Morine, of the agreement for the payment of $2,500 to the "Corwin" people as salvage upon the launches and lighter, and of his payment of that sum and the delivery over to him of the lighterage plant. He further advised Mr. Pennell that he would hold the lighters and launch until advised that the draft had been paid, and that he would in the meantime keep them employed as much as possible, their earnings to be placed against the indebtedness. He expressed the hope that the indebtedness would be wiped out in a very short time. (Trans., pp. 162–4.) That this hope was well founded appears from the statement of Captain Morine who, writing to defendant in error, under date of June 24th, 1900—just thirteen days subsequently—said: "Captain Humphrey has been keeping the boat and lighter employed constantly, and we have about $1,000 to our credit now." (Trans., p. 155.)

With the consent and approval of agent Humphrey a survey was held upon the "Sudden," and it was recommended that she be sold, and she was sold. Upon the demand of the Captain of the "Corwin," agent Humphrey consenting, the miscellaneous cargo upon the "Sudden" was put up at auction and sold. The sale was by manifest lots. The portion of the cargo shipped by defendant in error to itself and sold at this sale consisted of 150 tons of coal, 6000 feet of lumber, 10 anchors and chain, and a miscellaneous lot of provisions, groceries, liquors, etc. These goods were knocked

down for $530, and this money was taken by the "Corwin" people, and has been, so far as we are advised, appropriated to their own use. The auction was held in Nome, and the sale was, as we have said, by manifest lots, the goods remaining in the hold of the vessel anchored off the beach, without examination as to quantity or condition, or otherwise, by the buyers, and without opportunity to examine. Neither Humphrey, the agent of defendant in error, nor Captain Panno, the commander of the vessel, or any other person connected with the defendant in error, took any steps or made any effort to secure an agreement with the salvors fixing a proper salvage charge, or to secure the unloading and delivery of the goods of defendant in error, subject to a salvage lien in favor of the salvors, or for the unloading of the goods prior to the sale, in order that the most advantageous prices might be obtained upon the sale, or with a view to the buying in of the goods if there were not buyers at fair prices. No step was taken and nothing was done to minimize the loss. It is in evidence that, at the time of the sale, coal was worth at Nome approximately $100 per ton. To have lightered it from ship to shore was worth $18.00 per ton. (Trans., pp. 108–9.) Of the 150 tons covered by the policy sued on and consigned to defendant in error, the agent of defendant in error bought in 100 tons, paying therefor $4 per ton. Of this purchase, Morine informed defendant in error by letter under date of August 4th (Trans., pp. 169–170), and for this same coal, so Morine in the same communication informs us (Trans., pp. 170–1), Humphrey obtained $60 per ton.

From the foregoing statement of facts it will be seen that, with the exception of the merchandise belonging to defendant in error, which was taken on board the steamer "Corwin" and the ships "Pitcairn" and "Richardson," the whole of the insured cargo arrived in specie at destination, and that the loss claimed by defendant in error grows out of its sale at Nome under the circumstances detailed. Whether, under those circumstances, the so-called loss was one insured against, that is, was one caused by "a peril of the sea," is one of the questions for decision by this Court. And another is whether or not, in view of the absence of any kind of effort upon the part of the agents of defendant in error at Nome to "sue and labor" for the reduction of the damage, there is any liability upon the part of the plaintiff in error.

Another point upon which we challenge the correctness of the verdict and judgment grows out of a ruling of the Court concerning the effect of the policy valuation of the launch and lighters upon the liability of plaintiff in error for the $2,500 salvage service payment.

We have already called attention to the policy provision imposing upon the insured, its agents and servants, the obligation to "sue, labor, and use all reasonable and proper means for the security, *preservation, relief, and recovery* of the property insured." To the charge of that kind of expense it is provided that the plaintiff in error should "contribute in proportion as the sum insured is to the whole amount at risk." (Trans., p. 19.) The policy valuation of the lighterage plant was $3,000, and the salvage service payment was $2,500. For the whole of

this latter sum, with interest, the plaintiff in error was, under the sue and labor clause, liable, unless for other reasons to be presently discussed not liable at all, if, as to such character of payment, the policy valuation was controlling. The learned trial judge held that the valuation was controlling, and the whole $2,500 with interest is, under this ruling, included in the verdict. Our contention is, that in calculating the proportion of the $2,500 for which plaintiff in error could be held, if liable at all for this item, the actual value of the launch and lighters at Nome, and not the policy valuation, should have been taken as the basis of the calculation. As we have said, the ruling of the Court was against us upon this point, and this ruling we challenge as error.

Another and important question for decision is this: Is an insurer liable for a loss resulting from the taking of a known and apparent risk, which the captain navigating the vessel, a skillful mariner, should have understood and avoided? In other words, the loss claimed in this case having resulted from the deliberate putting of an unsheathed vessel into the ice of Behring Sea, the injury which was suffered being one that was to have been fairly anticipated, can the plaintiff in error be held accountable for that loss? The learned Circuit Judge held that the willful, although unnecessary, assumption of a known risk does not relieve the insurer from liability. We contend that the law, both upon precedent and principle, is otherwise.

There were certain rulings of the Court upon the admission and rejection of testimony which were excepted to, which we will more particularly notice later on.

ASSIGNMENT OF ERRORS.

The assignment of errors is to be found in the transcript of record, p. 335 *et seq.*

SPECIFICATION OF ERRORS.

1. The Court erred in refusing upon request of plaintiff in error, to direct the jury to bring in a verdict in favor of defendant."

2. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 311.)

"Upon the claim of plaintiff for the amount insured upon the cargo under deck, the jury is directed to find in favor of defendant."

3. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 311.)

"Upon the claim of plaintiff for the amount insured upon the cargo above deck, the jury is directed to find in favor of defendant."

4. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 311.)

"The policy in this action sued on covered two classes of merchandise, that is, a certain lighterage plant shipped and carried upon the barkentine 'Catherine Sudden' above deck, and certain merchandise consisting of coal, lumber and other articles shipped and carried upon said barkentine below deck. In relation to the first lot, to wit, the lighterage plant, it does not appear that any injury or damage resulted thereto from the accident to

the barkentine mentioned in the complaint and referred to in the testimony, or that plaintiff, as to said lighterage plant, suffered any loss or damage within the protection of the policy, except in so far as plaintiff was compelled to pay salvage for the towing of said lighterage plant from the place where the accident to the barkentine occurred to its destination at Nome. The defendant is not liable for the whole of the cost of saving the lighterage plant. Its contract with the plaintiff was to pay such proportion of the salvage cost as the amount for which the plant was insured, to wit, $3000, bore to the value of the plant. The defendant does not deny that it is liable to the extent named, and you may therefore find a verdict in favor of plaintiff for such proportion of the salvage cost upon the lighterage plant as the sum insured, to wit, $3000, bears to the value of that plant at Nome at the time of its arrival there. In arriving at the value of the plant you will disregard the valuation put upon the plant in the policy. For the purpose of arriving at the value of the plant at Nome you may take into consideration all the facts and circumstances testified to in this case, from which such value may be fairly and justly arrived at."

5. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 312.)

"The burden is upon the plaintiff to prove to you what the actual value of the lighterage plant was. If from the testimony in the case you are able to arrive at the actual value of that plant, you may, as to this part of plaintiff's claim, find for the plaintiff in an

amount which will be equal to the proportion that the insurance on the plant bears to such value. But if plaintiff has not proven, and you are not able from the evidence to determine the actual value, then, as to this part of plaintiff's claim, I direct you that you can only find nominal damages. By nominal damages is meant a trifling sum, as contradistinguished from a substantial sum. A verdict for one dollar, for instance, would be a verdict for nominal damages. You will remember that upon this question of value the valuation in the policy is not determinative of the actual value."

6. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 313.)

"The reasonable value of the salvage service rendered by the Corwin Company in rescuing the lighterage plant from the position it was in is an open question in this case. If the jury is satisfied that $2,500 was more than that service was worth, it may so find. The defendant cannot be held liable for a salvage payment in excess of the reasonable value of the service rendered."

7. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 313.)

"Plaintiff cannot recover from defendant any portion of the amount paid by it to the salvors for the salvage of the lighterage plant, or any portion of the value of such service, if, in fact, said plant, or any material portion thereof, was not, at the time that Captain Panno made his bargain with the salvors to pay $2,500 for their towage into Nome, in danger of being lost by reason of

the accident to the 'Sudden.' If from the evidence you find that at the time Captain Panno made his bargain with the salvors for the towage of the lighterage plant into Nome, that plant was not in danger of being wholly and totally lost, then and in that case your verdict should be for the defendant."

8. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 313.)

"In relation to the insurance upon the cargo shipped under deck, and other than the lighterage plant concerning which I have already charged you, I instruct you as follows:

"The plaintiff claims and alleges that there was an actual total loss of this merchandise, and has offered no evidence tending to show what the actual loss was, if it was in fact less than total. If, therefore, under the instructions which the Court gives, you find that the loss upon this cargo, other than the lighterage plant, was not total, then and in that case your verdict must be for the defendant."

9. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 314.)

"The defendant did not undertake to pay any loss that plaintiff might suffer by reason of injury to the cargo. The policy provides that it is not to pay anything upon the cargo shipped below deck unless the damage within the protection of the policy shall be equal to at least fifty per cent. of the value of such cargo. In the absence of averment or proof fixing the loss at less

than total, plaintiff is bound to establish a total loss, or fail, and if plaintiff has not, under the instructions which the Court gives you, established a total loss, your verdict must be for the defendant."

10. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 314.)

"I charge you, that if the cargo shipped under deck, or any substantial part of it, arrived at its intended port of destination, and was at said time of any substantial value, that then and in that case there was not, as to said cargo, a total loss, unless the sale at Nome at which said cargo was sold was, in fact, the result of actual necessity, and could not have been avoided by any effort, or efforts, on the part of plaintiff or its agent, or agents, at Nome; and I charge you that the necessity of that sale is not established by proof that the Corwin Company claimed the whole property, as salvors, or insisted that the property should be sold at the time and place that it was sold. If said sale could have been avoided by any reasonable arrangement with the salvors, it was the duty of plaintiff and plaintiff's agents to make such arrangement, and the burden is upon plaintiff to show that every reasonable effort was made to accomplish this end; and if plaintiff has failed to make proof to this effect, then and in that case you should find that said sale was not a sale of necessity, and if you so find your verdict should be for the defendant."

11. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 315.)

"If the value of the salvage service to the cargo under deck was less than the whole value of such cargo when saved, it was the duty of the agent of plaintiff at Nome to induce the salvors to accept the reasonable value of such salvage service, and if such agent made no effort to secure such acceptance of such reasonable value, or otherwise to reduce the loss to the insured and to the defendant as its insurer, plaintiff cannot recover, and your verdict must be for the defendant."

12. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 315.)

"In this connection plaintiff alleges and claims a total loss. Under this averment and claim plaintiff must prove a total loss, or fail. If from the evidence you find that a portion of the cargo shipped under deck and covered by the policy sued on was not lost to plaintiff, but in fact came into the possession of plaintiff at Nome, and that the expense to plaintiff in securing the possession and delivery to it of that portion of the cargo was materially less than the value of said portion of said cargo in the condition in which it was delivered to plaintiff, then and in that case your verdict must be for the defendant."

13. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 316.)

"In reaching your finding in this case as to whether the loss upon the cargo under deck was, or was not, total, you cannot take into consideration any estimate as to the value of the salvage service performed by

the steamer 'Corwin.' The value of that service was not fixed by the parties interested, and it is not shown that it has at any time been fixed by any court. What the value of that service was is not an issue upon this trial, and cannot be collaterally determined in this case. Whether the loss upon the cargo under deck was, or was not, total, depends upon other considerations than the value of the salvage service, and must be determined by you under the instructions which the Court gives you without regard to what the value of that service may have been."

14. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 316.)

"I charge you, that if from the facts and circumstances proven in this case you are satisfied and find that, with reasonable effort upon the part of the plaintiff, the Nome Beach Lighterage and Transportation Company, an agreement might have been reached with the salvors, the Corwin Trading Company, fixing the amount to be paid the Corwin Company for salving said cargo, and that the release of said cargo by said salvors upon the payment of a sum less than the value thereof could have been secured, then and in that case you must find that the loss was not total, and your verdict must be in favor of defendant."

15. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 317.)

"It is the duty of a party insured under a contract of marine insurance to make such efforts as are within

his power to reduce such loss, or losses, as may happen within the protection of the policy, and if he fails in good faith to do so he forfeits any claim against his insurer that he would otherwise have."

16. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 317.)

"It was the duty of the plaintiff in this case, the Nome Beach Lighterage and Transportation Company, to have made such efforts as were in its power, or the power of its agent at Nome, to reduce the loss upon the cargo under deck covered by defendant's policy. It was the duty of said plaintiff to have procured, if possible, an arrangement with the salvors fixing a reasonable amount for the salvage services and for the payment thereof. It was the duty of said plaintiff, if possible, to have arranged for, and to have tendered to the salvors such an amount as the salvage service was reasonably worth, and to have endeavored to have secured the acceptance of such amount and the delivery over to plaintiff of the salved cargo. Not only did the law enjoin upon the plaintiff the doing of these things, but the policy especially provides that, and the plaintiff herein, the Nome Beach Lighterage and Transportation Company, for itself, its factors, servants and assigns, engaged and agreed, that it would sue, labor, travel and use all reasonable and proper means for the security, preservation, relief, and recovery of the property insured, or any part thereof; the insurer stipulating upon its part to contribute to any expense properly incurred in the doing of these things or any of them. If the plain-

tiff, through its agent at Nome, failed to do the things above enumerated, and having the power to do so, made no effort to have the amount justly payable for salvage service fixed, and to secure the funds with which to make such payment, and to secure the possession of said cargo, then and in that case your verdict should be for the defendant."

17. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 318.)

"If from the evidence you find that the cargo under deck upon the 'Catherine Sudden' and covered by the policy was, upon its arrival at Nome, of large value and commercially available as collateral security for money to be borrowed thereon, then and in that case it was the duty of plaintiff's agent at Nome to have made reasonable efforts to borrow such money upon such security as would have enabled plaintiff to have paid to the salvors a reasonable charge for salvage service, if an agreement for such reasonable charge could have been secured; and a failure upon the part of plaintiff, or its agent, to do these things, if they could have been done, would be in violation of plaintiff's obligation to the defendant, and such failure, if such failure there was, will, as to the cargo under deck, defeat plaintiff's claim as against defendant."

18. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 318.)

"The burden is upon the plaintiff to prove to you that it did, through its agent at Nome, use all proper

and reasonably possible efforts to secure an arrangement with the salvors fixing the amount of the salvage charge and for the release of the salved cargo, and if it has failed to prove to you that it did use all such proper and reasonably possible efforts, then and in that case your verdict should be against plaintiff and in favor of defendant."

19. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 319.)

"If the loss upon the insured cargo was, in fact, only partial, and not total, such partial loss could not be converted into a total loss because of the sale at Nome, unless the sale itself was necessary and unless, in the conduct of the sale, plaintiff's representatives at Nome took all reasonably proper steps to secure the best obtainable prices for the goods. If the sale itself was not necessary, or if plaintiff's representatives before and at the time of the sale did not take such steps as a reasonably prudent man under similar circumstances should and would have taken to secure the best obtainable prices for the goods sold, then such sale did not make what would otherwise have been a partial loss, if in fact the loss was only partial, into a total loss. And if, under the instructions which the Court gives, you find that the loss was not total, your verdict should be for the defendant."

20. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 319.)

"The burden is upon the claimant in this case, to wit, the plaintiff, to show that the sale was necessary;

that is, that claimant could not, by doing what a reasonably prudent man having his own interests in view, should and would do, have avoided the selling of the goods under the circumstances under which they were sold. The defendant is not called upon to show that the sale was not necessary, but the burden in that respect, as already stated, rests upon the claimant; and if upon the whole case, you find the necessity of the sale unproven, your verdict upon that point must be in favor of defendant."

21. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 319.)

"If when the cargo was sold it was of a value materially in excess of the price for which it was sold, and claimant could have bought it in for that price, or for any price materially less than its value, and had the means with which to buy it in, or could have arranged for such money, it was its duty to have done so, and if it failed to do this, and neither claimant nor its agent at Nome took any steps to this end and made no effort to get the property in for the benefit of claimant and its insurer, then and in that case it cannot recover and your verdict should be for defendant."

22. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 320.)

"If the cargo owned by claimant sold at the auction at Nome were of a value which, if the goods had been bought in by claimant at the auction, would have been ample security for any advance which claimant

might have made in so buying them in, and such purchase within the knowledge of claimant would have made a material reduction in the loss of claimant and of the defendant, and claimant had, or could with reasonable effort have secured, the amount necessary to have so bought them, then and in that case claimant should have bought them in. Its failure to do so, under the circumstances detailed, would be a violation of claimant's duty and its obligation to defendant. Under such circumstances a party insured loses his right to claim the insurance and the insurer is released."

23. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 320.)

"Plaintiff is a corporation with its principal office and officers in this city. It could only act at Nome through an agent or agents, and whatever its agent or agents at Nome did or failed to do, the plaintiff did or failed to do. The agent of plaintiff at Nome, at the time of the arrival there of the 'Corwin' and 'Catherine Sudden,' was one Capt. Morine, and the evidence establishes that Capt. Morine at that time was ill, and being ill requested one Omar J. Humphrey to act for plaintiff in his place, and that Capt. Humphrey did undertake to do so. In case of a sudden emergency an agent has implied authority to take such measures upon behalf of his principal as the special circumstances of the case may seem to require, and under this rule, if Captain Morine was ill and unable to care for the interests of plaintiff resulting from the arrival of the 'Catherine Sudden,' and her cargo, and was unable to then

and there communicate with the officers of the company plaintiff in San Francisco, and the situation was one of emergency and required the attention of someone for and on behalf of plaintiff, then Captain Morine had the power to appoint Humphrey to act for the plaintiff, and by such appointment Humphrey became and was the agent of plaintiff, and whatever Humphrey did or omitted to do in relation to the cargo of the 'Catherine Sudden' was the act or omission, as the case might be, of plaintiff. If Humphrey, as such agent, failed to do what plaintiff if at Nome would have done to protect the interests of the insurer and to reduce as far as possible defendant's loss growing out of the wreck of the 'Catherine Sudden' then and in that case such failure was the failure of the plaintiff, and if there was such failure within the rules laid down in these instructions, then plaintiff cannot recover and your verdict should be for the defendant."

24. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 321.)

"In this case the plaintiff claims an actual total loss. To constitute an actual total loss there must be no rational hope and no practicable possibility of recovering possession of the property, for only when such hope and possibility have ceased does a loss become an actual total loss."

25. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 322.)

"In this case neither the fact that the salvors claimed the right to the exclusive possession of the cargo, if in fact they did so claim, nor the fact that they claimed the whole of the cargo in payment of their salvage service, if they did so claim, made a total loss, if, by any reasonable possibility, the plaintiff, or its agent at Nome, might by negotiation have arranged with the salvors for their salvage service and the re-delivery to plaintiff of said cargo. To make a loss a total loss all reasonably practical possibility of recovering the property must be gone. The fact, if it be a fact, that after arranging and paying for the services of the salvors, if this could have been done, there would have remained a danger that the 'Sudden' might be blown out to sea, such fact would not excuse the plaintiff in this case from making all reasonable efforts to arrange with the salvors for the payment of reasonable salvage and the release of the property from the possession of the salvors and from their lien for salvage service. The mere fact that there was a possibility of a subsequent disaster to the property would not excuse the insured from doing what was reasonably necessary to secure repossession of the property, if it was of a value materially in excess of the amount for which it could be redeemed from the salvage lien. It was the duty of the insured to take such reasonable steps as were possible to make this redemption, and then to secure the property against the possibility of further loss."

26. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 322.)

"The mere fact that the insured cargo was sold at auction at the time and place testified to did not, in or of itself, make the loss a total loss."

27. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 323.)

"The taking and retaining of possession of the insured cargo by the salvors did not make the loss a total loss. Salvors have the legal right to retain the possession of property salved until the payment to them of whatever may be due for salvage service. But such taking and retention do not make the loss a total loss."

28. The Court erred in refusing to charge the jury, as required by plaintiff in error, as follows: (Trans., p. 323.)

"If salvors having rightfully taken possession of salved property thereafter wrongfully convert it to their own use, and the insured is by such wrongful conversion deprived of the property, the loss thus suffered is not within the protection of the policy. Such conversion is, in effect, an embezzlement of the property; and for such an embezzlement the insurer is not liable. If in this case the salvors having lawful possession of the insured cargo wrongfully converted it to their own use, whether with or without the consent of the captain, and by reason of such wrongful conversion the property was lost, plaintiff cannot recover for such loss. Such loss was not within the protection of the policy, and defendant is not liable therefor."

29. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 323.)

"Upon the arrival of the 'Catherine Sudden' at Nome it became the duty of the agent of plaintiff to do whatever might be necessary to obtain possession of the property and to protect the insurer from further unnecessary loss, and this without regard to the refusal of the salvors to deliver possession of the cargo to Captain Panno or in any other respect to comply with Captain Panno's requests or suggestions; and if such agent failed to do what, in this connection, he reasonably might and should have done, plaintiff cannot recover, and your verdict would be for the defendant."

30. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 324.)

"The consent of the witness Gollin to the sale of the insured cargo at Nome, as testified to by him, does not render necessary a finding upon your part that the sale itself was necessary, nor estop the defendant from claiming that it was not necessary."

31. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 324.)

"The consent of the witness Gollin to the sale of the insured cargo, as testified to by him, did not relieve the plaintiff and its agents at Nome, from the necessity of doing whatever was in their power to arrange with the salvors the value of the salvage service, and for the payment thereof and the recovery of the possession of the insured cargo, and if they neglected to do what they might have done in these particulars plaintiff cannot recover, and your verdict must be for the defendant."

32. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 324.)

"The consent of the witness Gollin to the sale of the insured cargo, as testified to by him, did not relieve plaintiff and its agents at Nome from its obligation at that sale to do whatever might have been reasonably possible to protect the defendant from unnecessary loss. If, at that sale, plaintiff might have bought in the insured cargo at a figure materially less than the value of the cargo, and might have arranged for such purchase and for the means of paying the purchase price, then it was the duty of plaintiff and its agents at Nome to have done these things, and if they failed to do so plaintiff cannot recover, and your verdict must be for the defendant.

"The duty of plaintiff and plaintiff's agent in the particulars stated did not terminate until all reasonable possibility of their protecting defendant from unnecessary loss had passed.

"The burden is upon the plaintiff to prove, that it could not have prevented the sacrifice of the goods at the auction sale, if in fact they were sacrificed, and if plaintiff has failed to prove this it cannot recover, and your verdict must be for the defendant."

33. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 325.)

"If from the evidence you find that Omar J. Humphrey was acting as the agent for plaintiff at Nome immediately preceding the time of the sale, and at the time

of the sale, and that in his presence the witness Gollin asked if there were any facilities at Nome for lightering the 'Sudden' cargo, and in the presence of said Humphrey, was told that there were no such facilities, and this statement was untrue, and the said Humphrey was then in possession of a lighterage plant which could and should have been used for lightering said cargo, and did not correct said false statement, if said statement was false, then and in that case the consent of the witness Gollin to said sale does not affect the right of the defendant to claim that said sale was unauthorized and unnecessary."

34. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 325.)

"In every marine insurance upon cargo a warranty is implied that the ship upon which said cargo is carried is seaworthy, and a ship is seaworthy only where it is reasonably fit to perform the services and to encounter the ordinary perils of the voyage contemplated by the parties. If you find that the barkentine 'Catherine Sudden' was not seaworthy, that is, was not reasonably fit to perform the services and to encounter the ordinary perils of the voyage contemplated by the parties to the policy, your verdict should be for the defendant."

35. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 326.)

"Where different portions of a voyage contemplated by a policy differ in respect to the things requisite to make the ship seaworthy therefor, the warranty of

seaworthiness is not complied with unless, at the commencement of each portion, the ship is seaworthy with reference to that portion."

36. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 326.)

"Unless the barkentine 'Catherine Sudden' was so constructed as to be reasonably fit to encounter and survive the peril of ice in the Behring Sea under such circumstances and conditions as were to have been reasonably anticipated upon the voyage from San Francisco to Nome, then she was not seaworthy; and if you so find, your verdict must be for defendant."

37. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 326.)

"An insurer is not exonerated by the negligence of the insured, or of his agents, or others, but an insurer is not liable for the wilful act of the insured.

"If from the evidence you find that the plaintiff, as owner of the 'Catherine Sudden,' dispatched her upon the voyage to Nome, intending and with the understanding that she should sail into the Behring Sea without regard to the presence of ice therein, and that by reason of her construction and condition she was not fit to go into that sea and into the ice therein, and was likely to meet with the accident which in fact befell her, then and in that case your verdict must be for the defendant."

39. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 326.)

" In the navigation of the 'Catherine Sudden' from San Francisco to Nome the captain of said vessel was the agent and representative of the plaintiff, and if he put his vessel into the ice knowing that she was not fit to go into the ice and was likely to meet with the accident which in fact befell her, plaintiff is responsible for what he did; and if you find, as already stated, that the master under these circumstances put the vessel into the ice when he should not have done so, then and in that case your verdict must be for the defendant."

40. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 327.)

The plaintiff warranted to the defendant that the 'Catherine Sudden' was seaworthy, and every warranty of seaworthiness includes a warranty that the master is competent.

"If from the evidence you find that the 'Catherine Sudden,' under all the circumstances surrounding her voyage from San Francisco to Nome, and while in the Behring Sea, and at the time she was put into the ice, was not properly navigated, and that such failure to properly navigate the vessel was because of the incompetence of her master, then and in that case your verdict should be for the defendant."

41. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 327.)

" If from the evidence you find that the sale referred to in the pleadings was, in fact, set aside, or vacated, then and in that case, as to plaintiff's claim for

insurance upon the cargo under deck, your verdict should be for defendant."

42. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 327.)

"The jury is charged that a statement by Mr. Davis, the agent of the defendant, to the secretary of plaintiff, that in his opinion defendant was liable, and to the effect that he thought the loss ought to be paid, accompanied by the further statement that by reason of his relation to his re-insurers he could not pay the loss, does not amount to an admission of liability and in no wise affects the rights of the defendant in this case. If, under the instructions which the Court gives you, you are of the opinion that the defendant is not liable, you will so find, without regard to any statement of Mr. Davis to Mr. Pennell."

43. The Court erred in charging the jury, as follows:

"The policy sued on covers two classes of merchandise: the lighterage plant, carried above deck, and the merchandise, including coal and lumber, carried below deck. These two classes of property are separately valued in the policy, that above deck being valued at $3000, and that below deck at $5250. Where such separate valuation is made, it amounts to separate and distinct insurance upon each lot, so that, in considering the questions that arise, you are to treat these two classes of property, with respect to the nature, extent or proportion of the loss, as having been separately insured." (Trans., p. 328.)

44. The Court erred in charging the jury, as follows: "The values stated in the policy are the values agreed upon between the parties, and are binding and conclusive between them in this action." (Trans., p. 328.)

45. The Court erred in charging the jury, as follows:

"It does not appear that any injury or damage resulted to the lighterage plant from the accident to the 'Catherine Sudden,' or that the plaintiff suffered any loss or damage, as to said plant, within the protection of the policy, except in so far as plaintiff was compelled to pay salvage for the towing of said lighterage plant from the place of the accident to Nome. As to such loss, the stipulation of the policy is to the effect that, in case of loss or misfortune resulting from any peril insured against, the insured is to sue, labor and travel and use all reasonable and proper means for the security, preservation and recovery of the property insured, for the expense of which the insurer will contribute in proportion as the sum insured is to the whole sum at risk. The extent of the defendant's liability under this clause, as to the lighterage plant, is such proportion of the cost of saving the plant as the amount for which the plant was insured bore to its valuation, as stated in the policy, which valuation is $3,000. And with respect to said plant, if you find that the 'Catherine Sudden' was seaworthy for the voyage, the plaintiff is entitled to recover the $2,500, paid for its salvage, plus the reasonable value of the services rendered by the launch and barge in the discharge of the 'Corwin' at Nome." (Trans., p. 329.)

46. The Court erred in charging the jury, as follows:

"The accident to the vessel by which a hole was stove in her bow and she was almost submerged, was a peril of the sea from which the cargo under deck would have been lost, but for the intervention of the salvors who applied themselves to the rescue. In this way, the vessel and cargo came rightfully into the possession of the salvors, who thereupon and after arriving at Nome with the vessel and cargo, claimed the whole of such cargo under deck for salvage service, and, so claiming, permanently deprived the owners of said property." (Trans., p. 329.)

47. The Court erred in charging the jury, as follows:

"There were no tribunals at Nome authorized to determine the question of salvage, and no recognized authority in that behalf other than the captain of the revenue cutter then at that place, and who, acting as arbiter in the matter, gave such cargo to the salvors, by whom it was sold, and thereby became and was a total loss to plaintiff within the meaning of the law, and for this loss the defendant is liable, unless the plaintiff might, with reasonable effort on its part, have arranged with the salvors for an adjustment of the salvage claim and the delivery to it of the said cargo." (Trans., p. 329.)

48. The Court erred in charging the jury, as follows:

"The plaintiff's duly authorized agent at Nome was Morine, whose authority was constituted by a formal power of attorney, without any power of substitution.

Morine, being sick, undertook to constitute Humphrey, the plaintiff's agent in his, Morine's stead. It is not claimed that Humphrey was in duty bound to advance from his own funds money to satisfy the salvage claim, or to borrow money therefor, and it does not appear that such claim could be satisfied with less than the entire cargo. The contention as to this is that Humphrey should have made every reasonable effort to that end, and, being without means belonging to plaintiff, should have endeavored to hypothecate the salved cargo for such purpose. You may determine whether, under the circumstances, Humphrey was required to make such effort, and, if so, whether the plaintiff is precluded in its right to recover by his failure in that respect. In this connection, you may consider the action taken by Gollin, the insurer's agent, in acquiescing in what was done." (Trans., p. 330.)

49. The Court erred in charging the jury, as follows:

"The defendant contends that the cargo in question was not lost by a peril of the sea, but that it was wrongfully appropriated by the salvors, and in this respect it is admitted by the plaintiff that some cargo was taken from the vessel by the 'Rube Richardson' and the 'Pitcairn,' and some coal by the 'Corwin'; but you will remember that the vessel carried a general cargo, for many consignees, and the cargo here in question is only that part of her cargo consigned to the plaintiff." (Trans., p. 331.)

50. The Court erred in charging the jury, as follows:

"If it were a defense available to the defendant that the cargo was so taken out, as to which question I

shall instruct you hereafter, it would not be enough for the defendant to show that some cargo had been so taken out, but he must further show that the cargo so taken out was this particular cargo here insured, and not some other and different cargo. So, also, with respect to the coal taken by the 'Corwin.'" (Trans., p. 331.)

51. The Court erred in charging the jury, as follows:

"It is further to be noted that, with respect to this coal, there is some evidence tending to show that it was used by the 'Corwin' in making steam to enable her to perform the salvage service. If so, it was sacrificed for the common good, and was as much a loss by a peril of the sea as if it had been thrown overboard to lighten the ship and thus enable her to continue her voyage." (Trans., p. 331.)

52. The court erred in charging the jury, as follows:

"It does not appear what the proportion of the cargo taken by the 'Rube Richardson' and the 'Pitcairn' bore to the entire cargo under deck covered by this insurance. If it were in fact part of the cargo here insured, and was but a small proportion thereof, so that, notwithstanding it is saved, that which was lost yet exceeded fifty per cent. in value of the cargo insured, it would not be a defense in this case; and likewise with the coal, if the same had been used in performing the salvage service." (Trans., p. 331.)

53. The Court erred in charging the jury, as follows:

"The law attaches to such an insurance as this what is called a warranty of seaworthiness, that is, a warranty that the ship is reasonably fit to perform the service and to encounter the ordinary perils of the voy-

age contemplated by the parties to the policy. It is not required that the vessel shall be of the very best construction, or have the best equipment that modern science can invent, but only that she shall be reasonably fit to perform the service. Neither is it required that she be fit to encounter extraordinary perils, but only the ordinary perils of the voyage." (Trans., p. 332.)

54. The Court erred in charging the jury, as follows:

"It is admitted that the 'Catherine Sudden' was seaworthy to perform the voyage to Nome in open water, but the claim is that she was not fit to be put into the floating ice of Behring Sea. It is claimed that plaintiff sailed the vessel into such ice, and thereby endangered its safety; that this was not good seamanship or proper care; that, in the exercise of proper care, when ice was encountered, the course of the vessel should have been changed into open water until the danger from ice had passed. These are questions of seamanship, and if contact with ice was a condition which depended upon the discretion and seamanship of the Master, then it becomes a question whether or not the ice is one of the ordinary perils to be encountered on the voyage." (Trans., p. 332.)

55. The Court erred in charging the jury, as follows:

"Neither the negligence of the Master nor that of the owner relieves the insurer. Nothing short of a willful act of the insured would relieve the insurer. By 'willful act of the insured' is not meant an act intentionally or negligently done resulting in the loss of the insured property, even though the negligence be gross, but the act must be one concurred in by the insured with the

corrupt design of destroying the property, a thing not claimed in this case." (Trans., p. 332.)

56. The Court erred in charging the jury, as follows:

"If you find for the plaintiff, gentlemen, you will allow it interest on whatever amount you find at the rate of 7% from the first day of May, 1901." (Trans. p. 332.)

57. The Court erred in overruling the question propounded by counsel for plaintiff in error to the witness W. S. Davis, as follows: "Q. In stating to these gentlemen that their proofs of loss were sufficient and satisfactory, did the fact that it was stated that Walter Gollin had consented to the sale have any effect on your judgment in the matter?" To which the answer of the witness was: "Yes, sir; for the reason that I have known Mr. Gollin ever since I have been in the insurance business, and I have great faith in his ability. He has been a representative—he was the representative of the Transatlantic Marine Insurance Company, and settled many losses, and I have always known him to be strictly upright." (Trans., pp. 61–2.)

58. The Court erred in overruling the objection of counsel for plaintiff in error to the question propounded by counsel for defendant in error to the witness W. S. Davis as follows: "Q. Mr. Davis, did you consider that the interests of your company were being attended to at Nome by Walter Gollin?" To which the answer of the witness was: "I did not know, at the time I received notice of the loss, that Mr. Gollin was in Nome representing the underwriters. I did not attend the meeting when Mr. Gollin was appointed agent, but hearing afterwards that he had been appointed agent of the under-

writers, I was thoroughly satisfied with what he did." (Trans., p. 62.)

59. The Court erred in denying the motion of counsel for plaintiff in error to strike out the answer of the witness W. S. Davis as last above set forth, upon the ground that said answer was immaterial, irrelevant and incompetent, and not responsive to the question that was asked. (Trans., p. 62.)

60. The Court erred in overruling the objection of counsel for plaintiff in error to the question propounded by counsel for defendant in error to the witness W. S. Davis as follows: "Q. Did this company subsequently make an abandonment of this cargo to you?" To which the answer of the witness was: "I do not know whether that is the paper or not [referring to an alleged abandonment shown to witness by counsel for defendant in error], but you served an abandonment on us which was returned and not accepted." (Trans., pp. 63–4.)

61. The Court erred in overruling the objection of counsel for plaintiff in error to the question of counsel for the defendant in error propounded to the witness, W. W. Gollin, as follows: "Q. As such manager I suppose you had large experience in marine insurance matters?" To which the answer of the witness was: "Yes, sir; as manager of an insurance company I have adjusted and settled many losses in my time." (Trans., p. 85.)

61. The Court erred in denying motion of counsel for plaintiff in error to strike out the following testimony given by the witness, H. E. Pennell, to-wit: Counsel for defendant in error having asked the witness: "Q. Did

you have any conversations with Mr. Davis, the manager of this company, concerning the payment of the loss and the amount?" The witness answered: "I did; yes, sir. I had those conversations with Mr. Davis from time to time, in the way I have stated, telling him of the loss and asking him as to the mode of collecting under the policy; and as the different information was furnished and considered by Mr. Davis, I continued, of course, on behalf of the company, to demand our insurance money. In response to this demand I was informed by Mr. Davis that he considered the demand of my company just, and that in all fairness we should receive our money under the policy. Then I asked him why he did not pay it. He said that he would like to pay it, and would pay it, if it were not for the fact that he had reinsured a certain amount of the risk that he carried, and if he paid the amount of our policy he would have in some way to get it from the reinsurers, for they had given him to understand that if he paid it they would not pay him; and he said that he did not want to be out his money, as he would have to be until he would, perhaps, have to sue his reinsurers to get his money; and while he felt that we should have it justly, for this reason he could not pay it." The motion was to strike out all of the foregoing answer commencing with and after the words "In response to this demand I was informed." (Trans., pp. 150–1.)

Argument.

I.

THE LOSS UPON THE CARGO OTHER THAN THE LIGHTER AND LAUNCHES WAS NOT CAUSED BY A PERIL OF THE SEA, AND WAS NOT INSURED AGAINST, AND HENCE PLAINTIFF IN ERROR WAS NOT LIABLE THEREFOR.

The vessel carrying the cargo and the cargo itself, with the exception of such portion thereof as was taken on board the "Corwin," the "Pitcairn" and the "Richardson," arrived, in specie, at destination. What may have been the amount and value of that portion of the cargo taken on board the other vessels above named does not appear. Those vessels arrived in due course at Nome (Trans., p. 272). It follows, therefore, that all of the insured cargo outside what may have been consumed en route from the place of the accident to Nome arrived in due course at the latter place. It follows, therefore, that no loss as to the cargo was proven, except such as resulted from the sale of the goods upon the demand of the salvors assented to by the agent of the insured, and none of the lighterage plant outside of the salvage service payment of $2,500.

But it is claimed that the appropriation of the goods put on the relieving vessels, by those vessels, and the sale of the remainder of the cargo by the "Corwin" to satisfy the salvage lien of the latter, was a loss by a peril of the sea, and within the protection of the policy. The

Court sustained this contention, and so instructed the jury (Trans., pp. 330–1). Can this view of the law be sustained?

We do not question that a salvage charge properly adjusted or decreed is a loss for which an insurer is liable, but we do insist that an appropriation by a salvor to its own use of salved goods, without any adjustment of the value of the salvage service, furnishes no basis for a claim against an insurer. And so we insist that a sale by the salvors of the salved property, and an appropriation of the proceeds of that sale without an adjustment or decree fixing the value of the salvage service, does not furnish a foundation for a claim against the insurer. The insurer is doubtless bound to make good to the insured its proportion of the fair value of the salvage service, but until that value has been fixed by a proper adjustment, or by the decree of a competent tribunal, it cannot be said what the value of the salvage service is, nor to what extent the insurer may be called upon to make good the loss. By way of illustration let us suppose an extreme case. A vessel bound from San Francisco to Nome carries a cargo of the value of $100,000 insured for $100,000. Within a few hours' sail of her destination the vessel meets with an accident which calls for assistance which is duly rendered. The value of this service fairly computed is, let us say, $1,000. But the salvor asserts that it is worth the whole value of ship and cargo, and insisting upon this claim, and under circumstances similar to those existing in this case, it puts vessel and cargo up at auction and sells the cargo, we will say, to the person who is at the time acting as the agent of the

insured, for $1,000. Under these circumstances, could it be successfully contended that the insurer would be liable as for a total loss?

Must it not be said, in the case which we have supposed, and in the case at bar, that the damage suffered by the insured is not from a peril of the sea, but by reason of the improper and unlawful conduct of the salvor? It seems to us quite clear that, in the case supposed and in the case at bar, there is no legal causal connection at all between the accident and the subsequent loss to the insured resulting from the improper and unlawful conduct of the salvor; that the latter, within the meaning of the law, is a new, intervening and independent cause, for which the insurer cannot be held responsible.

The position of defendant in error in this case, as we understand it, is, that the sale of the cargo at Nome was forced by the salvors, and that the insured had no control over and could not prevent what was done. Conceding this to be so, their action is against the salvors, and not against the insurer. The insured cargo arrived safely at its destination. The plaintiff in error was not liable for anything less than a total loss, and that which was, in fact, less than a total loss could not, as against plaintiff in error, be converted into a total loss by unauthorized and unlawful conduct upon the part of the salvors. The plaintiff in error did not undertake to make good a loss so occasioned, and should not be held responsible therefor.

Waiving for the moment all criticism of the sale itself, and saying nothing as to the unfairness of accepting the merely nominal amount for which the cargo was sold as

fairly representative of its then value, how can it be said that the loss was a total one, the only loss for which plaintiff in error would be liable? Upon this record this Court cannot say that the salvage service was equal to the proceeds of the sale. That question cannot be collaterally settled in this action. And again, how is the Court to determine the value of the merchandise taken on board the "Corwin," the "Richardson" and the "Pitcairn," and none of which was sold? The law does not recognize the right of the owners, officers or crew of those vessels to appropriate the property taken by them to their own use, and we know of no decision, or any rule of law, which will sustain the claim that the goods thus appropriated were lost by a peril of the sea.

Our contention that a loss resulting from a sale by salvors, either at the port of destination or an intermediate port, is not one resulting from a peril of the sea, and hence not covered by the policy, seems to be well sustained by authority.

De Matos vs. *Saunders*, L. R. 7 c. p. 570.

Barber, Prin. Law Ins., 328.

"Where," says Mr. Barber, "cargo insured 'free of average,' or against total loss only, is landed in a damaged condition owing to sea perils, but a part of it is salable, though not at a profit, and the entire cargo is libeled for salvage in a court of admiralty and sold and the proceeds are distributed under a decree of the Court, the loss is not total, although the entire proceeds of the cargo are thus absorbed. For as the loss from the sea peril was but partial, the proceedings in the court of

admiralty not being the natural or necessary results of that peril, could not change the nature of the loss."

In the *De Matos* case (L. R. 7 C. P. 570) the facts were these: A cargo of salt worth, together with prepaid freight, about £1,900, was insured from Liverpool to Calcutta, the policy containing a memorandum warranting corn, fish, salt &c. free from average unless general or the ship be stranded. Having encountered bad weather, the ship lost both her anchors and had her masts cut away. The ship was taken in tow by salvors and placed on a bank out of the ordinary course of the voyage, where she lay on her port side for several tides and sustained considerable further injury. The salt was landed in a damaged state, and the ship repaired. About one-fifth of the salt might have been made salable, but would have realized no profit. Suits were instituted by the salvors in the admiralty court, and the salt sold under a decree. The entire proceeds of the sale were absorbed by the costs. *Held:* That there was only a *partial* loss upon the salt; *and further held, that the seizure and sale under the decree of the admiralty court was not a natural or necessary consequence of the peril insured against.* Speaking to this point the Court, speaking through *Willes*, J., said: "The contention that the loss, partial at the time it was incurred, was converted into a total loss by the acts of the salvors and the seizure and sale under the orders of the court of admiralty must fail, because those acts and proceedings were not the natural and necessary consequences of a peril insured against. The assured is entitled to recover from the underwriters for a loss arising from sea damage

and its proximate consequences; but it is not a proximate consequence of sea damage in general that there should be proceedings in the court of admiralty; a link is wanting." And the Court added (italics ours): "*As well might it be said that a proceeding by salvors setting up a false claim would convert a partial into a total loss: WHICH WOULD BE ABSURD.*" That which in the mind of the Court in that case would furnish no basis for a claim of total loss, a contention which to the mind of that court would be absurd, is the sole base of the judgment in this case in so far as the merchandise part of the insured cargo is concerned.

In the case at bar it must be conceded, that up to the time that the "Sudden," in tow of the "Corwin," dropped anchor at her port of destination, there had been no loss upon the cargo, and under the doctrine of the *De Matos* case, and within the text of Barber, the forced sale by the salvor did not bring the loss resulting therefrom within the protection of the policy. It may be that, under the sue and labor clause, plaintiff in error, in a properly brought suit, would be held liable for its proportion of a proper salvage charge, but it is certainly not liable because of the assertion of the salvors, uncontested, it seems, by the insured, that the whole cargo and its proceeds were due them in consideration of the service rendered.

What has already been said in relation to the main cargo applies with equal force to the lighterage plant. The policy valuation of that portion of the cargo was $3,000, and the payment for salvage service was only $2,500. The loss was, therefore, less than total, and not

recoverable under the policy unless the $2,500 paid may be claimed under the sue and labor clause.

II.

THE TRIAL COURT ERRED IN HOLDING THAT PLAINTIFF IN ERROR WAS LIABLE FOR THE WHOLE OF THE $2,500 PAID FOR THE SALVAGE SERVICE TO THE LIGHTERAGE PLANT.

If we are right in our contention that under the warranty against particular average and partial loss there was no loss within the meaning of the policy either upon cargo or lighterage plant, then the question is presented whether plaintiff in error is liable for any portion of the $2,500 paid the "Corwin" for towing the launch and lighters into Nome. As the lighterage plant was valued by the parties at $3,000, and as the payment for salvage was only $2,500, and this loss was therefore less than total, it follows that plaintiff in error cannot be called upon for any part of the $2,500 paid for salvage, unless it may be so called upon under that provision of the policy that authorizes the insured to sue and labor for the preservation of the property. (And upon the facts in this case it is more than doubtful, as will presently be shown, whether, even under the sue and labor clause, there is any liability for any part of that $2,500.)

The theory of the defendant in error and of the trial judge was that the liability of plaintiff in error as to the $2,500 paid for towing the lighterage plant was under the sue and labor clause. The charge upon this branch of

the case to the jury, which voices the theory of the Court and of counsel for defendant in error, was as follows (Trans., pp. 328-9):

"It does not appear that any injury or damage resulted to the lighterage plant from the accident to the 'Catherine Sudden,' or that the plaintiff suffered any loss or damage, as to said plant, within the protection of the policy, except in so far as plaintiff was compelled to pay salvage for the towing of said lighterage plant from the place of the accident to Nome. As to such loss, the stipulation of the policy is to the effect that, in case of loss or misfortune resulting from any peril insured against, the insured is to sue, labor and travel and use all reasonable and proper means for the security, preservation and recovery of the property insured, for the expense of which the insurer will contribute in proportion as the sum insured is to the whole sum at risk. The extent of the defendant's liability under this clause, as to the lighterage plant, is such proportion of the cost of saving the plant as the amount for which the plant was insured bore to its valuation, as stated in the policy, which valuation is $3,000. And with respect to said plant, if you find that the 'Catherine Sudden' was seaworthy for the voyage, the plaintiff is entitled to recover the $2,500 paid for its salvage, plus the reasonable value of the services rendered by the launch and barge in the discharge of the 'Corwin' at Nome."

To the giving of this instruction plaintiff in error duly excepted (Trans., p. 333).

(a) Our first point upon this branch of the case is that plaintiff in error is not liable for any portion of the

$2500 paid for the towage into Nome of the launch and lighters. The amount paid, as we know, was less than the policy valuation of the plant. The effect of the valuation was, as between the parties, to fix the value of the plant under a loss claim at $3000. (*Cal. Civ. Code*, 2736.) Under the valuation, if the plant had been a total loss, defendant in error could only have recovered $3000, whatever might have been the actual value. The premium charged and collected rested on this base. And this being so, defendant in error has no claim against plaintiff in error, unless, at the time of the making of the agreement to pay $2500 for salvage service, the lighterage plant was in danger of being a total loss.

Barber, Prin. Law Ins., p. 370.

"Where," says Mr. Barber, "the insurance is against total loss only, a claim for expenses incurred under the suing and laboring clause will be disallowed where it is evident from the facts of the case that no danger of a total loss existed."

In support of the text of the work from which we have just quoted the learned author cites,

Peninsular Ry. Co. vs. *Saunders*, 1 Best & Smith, 41;
2 Id., 266.
Booth vs. *Gair*, 15 Com. B. N. S., 291.
Kidston vs. *Empire Ins. Co.*, Law R., 1 C. P. 535;
2 Id. 357.

Upon these authorities we requested the trial judge to charge the jury (Trans., p. 313, request No. 8) that defendant in error, plaintiff below, could not recover any

portion of the amount paid by it to the salvors for the salvage of the lighterage plant, or any portion of the value of such service, if, in fact, said plant, or any material portion thereof, was not at the time the captain of the "Sudden" made his bargain with the salvors to pay $2,500 for their towage into Nome, in danger of being lost by reason of the accident to the "Sudden." This request was refused, and the jury was told that, provided they found against us upon the issue of unseaworthiness, defendant in error was entitled to recover the $2,500 paid for the salvage of the lighterage plant plus the reasonable value of certain services rendered by the launch and barge in the discharge of the "Corwin" at Nome (Trans., p. 329). The latter part of this instruction was based upon certain hearsay (Trans., p. 280) testimony, to the effect that Captain Panno had agreed that the salvors should have for towing the launch and lighters to Nome the service thereof in discharging the "Corwin" in addition to the money payment of $2,500.

In view of the well-settled law as evidenced by the authorities we have cited, we must assume that the Court based its refusal to charge as requested and the charge given upon the theory that the evidence was conclusive to the effect that at the time the salvage agreement was entered into, the lighterage plant, in the absence of that agreement, was doomed to destruction. But we submit that in this the Court was wholly in error, and that the fact was just the other way. The launch and lighters which were towed to Nome were on the deck of the "Sudden," were built for sea service, and could be floated to Nome. The sinking of the "Sudden" would not

have sunk them. At the time of the agreement for salvage service they were afloat in the water, and capable of independent navigation to Nome. Steam was gotten up on the launch, and she was within easy sail of Nome. There is not any testimony to show that either the launch or the lighters were at any time in danger of being lost, and it is apparent, in the nature of things, that they were not. That there was not the slight danger of a loss of the launch or the lighters is made clear by the uncontradicted testimony of Captain Panno, to be found at pages 297–9 of the record, supplemented by that of Captain Simmie, found at pages 279–80. At the time the "Corwin" came alongside the "Sudden," two of the lighters (the scow and one surf-boat) were already safely afloat (p. 297), and the lighter and the other surf boat were on the deck of the "Sudden" so detached that if the "Sudden" had gone down they would have floated (*Id.*). "Everything had been arranged," says Captain Panno, "so that they would be saved if the "Sudden" went down." (*Id.*) The captain of the "Corwin" pulled the launch off the deck of the "Sudden" for what he could pick up on the decks of the latter (p. 298), and then the remaining surf boat came off herself with a little help (*Id.*). It was after this, and after the "Sudden" had been gotten ready for the tow to Nome, that the bargain for salvage service was struck (*Id.* 299). The two surf boats were hoisted back onto the "Sudden," and only the launch and lighter were towed (*Id.*). In anticipation of steaming the launch, with lighters in tow, to Nome, both launch and lighter had taken coal on board from the "Sudden"

(*Id.*). In fact, Captain Panno tell us that it was his intention to steam the launch into Nome with the scow in tow (*Id.*). The launch had "a big steam capacity" (p. 300). We respectfully submit that the trial judge must have overlooked the testimony to which we have referred when preparing his charge to the jury. But in the light of that evidence we also respectfully submit, that refusing to charge as requested, and in charging as he did, the clearest kind of error was committed.

The reason for the rule, as stated in Barber, and in the cases referred to, is, that the insurer being liable only for a total loss, is not at all interested in the prevention of anything less than a total loss, and cannot in the nature of things be asked to contribute to an expense incurred to prevent a loss with which it is not concerned. The insured is, of course, justified in contracting to save the property which threatens a total loss, but if, as in the case at bar, the insured property is not at all in danger of being a total loss, he cannot ask his insurer to contribute to an expense undertaken solely in protection of the interest of the insured.

In reading over the testimony of Captain Panno, which, as we have said is uncontradicted, it is perfectly apparent that the agreement to pay $2,500 was not entered into with a view to saving the launch and lighters from impending peril of loss, but for the purpose of getting them into profitable employment at Nome Beach at the earliest possible moment. With the 150 tons of coal on the "Sudden" for use at Nome Beach in the operation of the launch in lightering from ship to shore, large profits were in sight, as against which the $2,500 went as

nothing. Captain Simmie tells us that the reasonable value at Nome, at that time, of the use of the lighter was $400 per day of 10 hours, and that if worked at night it was worth as much more. In addition to this, the launch could earn $50 per round trip on every tow made (Trans., p. 292). And the lighter was in fact rented for $400 per day (p. 289). In view of this testimony it is not to be wondered at that Captain Panno, as the agent of defendant, was willing to pay $2,500 for a 24-hour tow, but it is entirely clear that this payment was not for either *the security*, *the preservation*, *the relief*, or *the recovery* of the launch and lighters, and it was only for the one or the other of these purposes that the insured was authorized to incur expense on behalf of the insurer. The policy expressly so provides (Trans., p. 19), and if the expense incurred was not for the one or the other of these purposes, plaintiff in error is not liable therefor. To *secure* the property against a sea peril, to *preserve* property from damage by reason of a sea peril encountered, to *relieve* it from such a peril, and to *recover* it when it would otherwise, by reason of a sea peril, be wholly lost, were all within the authority of the sue and labor clause of the policy; but not within the widest stretch of the imagination has it ever been supposed that the underwriter was liable under this clause for an expense incurred in merely expediting an otherwise delayed voyage.

(b) If it be held that we are wrong upon the last point discussed, then we submit that the Court erred in ruling that under the sue and labor clause defendant in error could recover the whole of the $2500 paid for sal-

vage service. The provision of the policy is that to such expense as the insured incurs under the sue and labor clause, the insurer is to contribute in the proportion that "the sum insured is to the whole sum at risk." The trial judge ruled, as we understand the ruling, that the sum at risk was the sum insured. In this, we submit, the learned judge was in error. The sum "at risk" within the meaning of the sue and labor clause is neither the sum insured nor the valuation fixed by the policy. The sum at risk, under that clause of the policy, is what the insured stands to lose if the property be lost—the value of the property at the port of destination.

The phraseology of policies of marine insurance is more or less technical, and, as is well understood, this class of contracts has been kept substantially in the form in which they were originally cast, thus frequently necessitating an understanding of the purpose of particular parts of the agreement to determine the precise meaning thereof. Reading the sue and labor clause in the light of such an understanding, its meaning is easily arrived at.

In every contract of marine insurance it is contemplated by the parties that occasions may arise when, by the expenditure of effort or money upon the part of the insured, the insured property may be saved from an impending peril. The insured, personally, or through agents or servants, in touch with the property and in position to save or rescue it from the peril, or, by proper effort, to lessen the amount of the loss, is authorized upon his own behalf, and required upon behalf of the insurer, to sue and labor and make all necessary dis-

bursements to that end. The cost of these efforts is to be paid proportionately by the parties, and it is, as we have seen, so provided in the policy. Of the charges so incurred the insurer is to pay in proportion "as the sum insured is to the whole sum at risk" (Trans., p. 19). The relative interests of the insurer and insured in the property in peril are apparent. The insured is interested to the extent of its liability, the limit of which is the amount insured, while the insured is interested to the extent of the whole value of the property at the port of destination less the proportion thereof protected by the policy. The valuation of the property written in the policy does not at all measure the interest of the insured in the preservation of the property. It may be more or less than the true value. The true interest of each party in the preservation of the property is necessarily the amount which each stands to lose if the property be not saved, and each being to that extent and in that proportion interested in its preservation, it would be but fair that the cost of preserving or rescuing the property from the peril insured against should be shared in that proportion, and such, we have no doubt, is the meaning of the policy provision having relation to that situation.

The error of the trial judge in this connection was, we submit, in reading the words "sum at risk" to mean the sum *at the risk of the insurer.* This is unnecessarily narrowing the effect of the words, and the reason for the stipulation and the whole purpose and spirit thereof clearly indicate that the words "sum at risk" mean not merely the sum at the risk of the insurer, but

the sum at the risk of both parties. Both parties contribute to the payment, and it is because both are interested in saving the property from the peril which may bring about its destruction, that the contribution of each is measured by the proportion that each is interested in the property.

The words "the whole sum at risk" must stand either for the amount insured, the value of the property as stipulated in a valued policy, or, as we contend, the actual value of the property. That, independently of the reasons already urged, these words cannot have either the first or second of the above meanings, is quite clear. If the sum at risk, as used in the policy, is the sum insured, then the provision in effect is that, in every case, the insurer shall pay the expense incurred in the proportion that the sum insured bears to the sum insured, to-wit, the whole of it, which, of course, is not the meaning of the policy. It will be observed that under this construction the limitation of liability is not even measured by the amount of the insurance, and that giving to the phrase its full force, the insurer could be called upon to pay, by way of suing and laboring expense, more than the amount insured. A construction which leads to this result would seem to be absurd.

If, upon the other hand, as held in the instruction of the Court of which we complain, the insurer is to pay in the proportion that the sum insured bears to the valuation, then in every case where the valuation is equal to the insurance, the insurer will also pay the whole of the charges, and the insured will escape altogether, although

he may have as great, or even a greater, interest than the insurer in the saving of the property.

Finally upon this point we suggest that the *whole* sum at risk is *necessarily* the actual value of the property. If in these contracts it be intended that the sue and labor expense shall be paid in the proportion that the sum insured bears to the valuation fixed in the policy, then the word " whole " in the phrase under discussion was unnecessary and, in fact, without meaning. The words "*the whole sum*" at risk very aptly describe the whole interest of both parties in the subject matter of the insurance, but are certainly misleading if intended to mean only so much of the sum at risk as is covered by the valuation fixed in the policy.

We have cited no decision bearing directly upon the point we have been discussing, for the reason that we have found none. The absence of authority arises, we have no doubt, from the fact that it has never before occurred to any one that under the sue and labor clause, the *whole* sum at risk, within the spirit, purpose and meaning of that clause, is anything less than the *whole* sum at the risk of both parties to the contract.

III.

THE FAILURE OF THE AGENT AND REPRESENTATIVE OF THE INSURED AT NOME TO ARRANGE WITH THE SALVORS FOR A PROPER SALVAGE PAYMENT, AND TO SECURE TO THE SALVORS SUCH PAYMENT AND A DELIVERY THEREUPON OF THE INSURED GOODS, AND THE FURTHER FAILURE OF SUCH AGENT AND REPRESENTATIVE TO PROTECT THE PROPERTY FROM SACRIFICE AT A FORCED SALE, VIOLATED A MATERIAL CONDITION OF THE CONTRACT OF INSURANCE AND AVOIDED THE POLICY.

The policy, as we have seen, expressly provides that the insured, its factors and servants, shall sue, labor and travel, and use all reasonable and proper means for the security, preservation, relief and recovery of the property insured, or any part thereof. This clause of the policy is not only permissive but mandatory, and the underwriter is not liable if the insured fails to make such efforts to lessen the loss as a reasonably prudent man ought to make.

Rosetto vs. *Gurney*, 11 C. B. 188.

Understanding the law to be as we have stated (and also understanding that counsel for defendant in error does not contend otherwise), and further understanding the testimony to be without conflict to the effect that neither defendant in error or its agent Morine, or his substitute Humphrey, or the captain of the "Sudden," or

any other "servant" of defendant in error, made any effort, or took any step of any kind to negotiate with the salvors with a view to securing a reasonable salvage charge upon their part, or for the purpose of fixing their charge, or for the securing of the delivery of the insured merchandise to the insured, or to save it, or any part of it, from sacrifice at the sale at Nome, or in any way to limit the loss of the underwriters, we requested the trial judge to instruct the jury to find upon this issue against the defendant in error, and to bring in a verdict against the plaintiff in error. (Trans., p. 311.) This request was refused, and upon this ruling we assign error. (Trans., pp. 328 and 333.)

The Court did instruct the jury that if there had been a breach of the policy stipulation in the particulars referred to, their verdict should be in favor of plaintiff in error, and the jury (as generally happens in this class of cases) found no breach. But we respectfully submit, that as the evidence was without conflict, the Circuit judge should have given the peremptory direction requested.

Under the sue and labor clause of the policy in suit, as we have seen, the insured stipulates that its factors and agents shall "sue, labor and travel, and use all reasonable and proper means for the security, preservation, recovery and relief of the property insured, or any part thereof." Now, did Captain Panno, one of the servants of defendant in error, or Captain Humphrey, its acting agent at Nome, or any person connected with, or in the service of defendant in error, make any effort to do any of these things? The record answers, no.

What might Captain Panno and agent Humphrey have done, and what, under the circumstances, ought any man anxious to prevent the sacrifice and loss of the goods to have done? The first measure of precaution that should have been taken in regard to the goods, after the happening of the accident in the ice, is precisely what Captain Panno did in relation to the lighterage plant. He should have sought to arrange for a reasonable salvage charge. He was under no obligation to make to the "Corwin" people a gift of the ship and cargo for the services of the salvors in saving them. So far as the owners were concerned, they would be no better off, under such an arrangement, than if the vessel and the goods laden thereon went to the bottom. They were within twenty-four hours' steam of Nome, with fair weather and smooth water where free from ice. The service to be performed, and in fact performed, called for no unusual effort, and brought the salvors into no peril. To put a pump and pumping crew on board the "Sudden," and pump out the water, and then make a twenty-four hour tow through smooth water in fair weather was what had to be done, and this certainly was not worth the whole of the vessel and her valuable cargo. The salvors made what seems to have been considered a fair bargain for the salvage of the lighterage plant, and why not for the insured cargo? They did not insist upon keeping the launch and lighters as the price for saving them. With what reason, then, can it be said that a reasonable salvage charge could not have been negotiated for the vessel and cargo? Why Captain Panno did not seek to negotiate therefor we are not told. He simply says that he did

nothing whatever to that end. Arrived at Nome, the vessel with her cargo on board cast anchor and, so far as liability upon the part of plaintiff in error is concerned, outside of its obligation to meet a fair charge for salvage service, was as safely at her destination as if she had met with no accident. The salvage charge for the lighterage plant had been stipulated for, and Captain Humphrey promptly and in a business-like way arranged for the payment of the $2,500 due, and took delivery. There was nothing to prevent him at that time from *making an effort* to secure a similar satisfactory adjustment of the salvage charge upon the insured cargo of defendant in error, but he did not move a finger in that direction. It does not appear that, if approached upon the subject, the salvors would not have made a reasonable charge and a reasonable arrangement for the payment thereof. No one upon behalf of defendant in error asked them to do so, and it is not pretended that anyone did, or that any effort was made to finance the release of the merchandise. The agents of defendant in error were bound by stipulation and by the dictates of the commonest kind of business honesty to have, at least, made an effort to minimize the loss. The ship was at anchor, just as she would have been if she had come in under full sail, the insured goods were on board, and the defendant in error through its agent Humphrey was in possession of a lighter and launches afloat, equipped and manned, with which to lighter the goods from ship to shore. Why, under these circumstances, we again ask, was no effort made to arrange with the salvors the amount of their salvage charge, to finance for this, to

secure the delivery of the goods, and to take them from the vessel to the shore—to do, in fact, what any ordinarily capable business man would certainly have done? The numerous excuses which have been urged by way of answer to this very simple question only accentuate, it seems to us, the utter weakness of the position of defendant in error.

It is said, in the first place, that the "Corwin" people asserted and claimed that they were entitled to the vessel and cargo as compensation for their salvage service. Conceding that they did so, in what way does that fact excuse the defendant in error through its agents at Nome from seeking to make a proper and business-like arrangement with them? Who is there to say, that if such an effert had been made, it would have been unsuccessful? They had negotiated fairly in relation to the lighterage plant; who can authoritatively tell us they would not have done likewise concerning the cargo, if properly approached and properly dealt with? The amount realized at the auction sale for the goods of defendant in error was only one-fourth of the amount for which they were insured, and, as we shall presently show, not over one-thirtieth the value of the 150 tons of coal which were a part of the merchandise consigned to defendant in error. From this it is clear that the salvors were not seeking to absorb the property in specie. If they were satisfied to accept for their salvage service so small a proportion of the value of the consignment to defendant in error, what possible difficulty could there have been in arranging with them for that amount, or, if you please, and if necessary, for a still higher amount?

Up to anything less than the amount of the insurance, there would have been a salvage to the underwriter, and an effort to obtain this salvage it was the duty of defendant in error and its agents to make. The mere fact that the salvors had said they claimed the whole property did not excuse the making of effort to secure a proper adjustment with them, *and it should not be ruled as the law of the insurance contract* that the mere making of such a claim excuses the making of a reasonable effort to secure a proper adjustment of the salvage charge and a delivery of the goods.

The next excuse suggested for the failure of the agents of defendant in error to arrange with the salvors for their salvage charge is, that the financing of the payment of any charge agreed upon might, in the unsettled condition of affairs at Nome, have been difficult. Our answer to this suggestion is that until an effort had been made to reach an agreement with the salvors, it is not possible to say whether there would or would not have been any difficulty in financing the amount agreed upon. We do know that the agent of defendant in error found no difficulty in financing the salvage charge upon the lighterage plant, and this is certainly some evidence that business could be done at Nome in the usual way.

A very simple way of arranging for the payment of any salvage charge that might have been agreed upon would have been to have borrowed the money upon the merchandise at stake, or, if necessary, to have sold sufficient thereof to have made good the amount needed. In the insured consignment to defendant in error there

were 150 tons of coal. Captain Simmie tells us that he knows that coal was worth $100 per ton when the "Sudden" arrived at Nome. (Trans., p. 286.) The witness Moore says it was worth from $100 to $125 per ton (Trans., p. 251). Arthur M. Pope says the average for June was $60. (Trans., p. 247.) Humphrey, the agent of defendant in error, sold to defendant in error during that month coal for which the latter paid $60 per ton. (Trans., pp. 170–1.)

The next excuse for the omission of an effort to reach an agreement with the salvors is, that the "Sudden" with her cargo was at anchor in an open roadstead, and that because there was a possibility of a storm coming up, which might throw her upon the beach, it was necessary to expedite things. The answer to this is apparent. The necessity for expedition, if any there was, did not excuse the making of proper effort under the circumstances to secure the imposition of only a reasonable charge for the salvage service and for the use of all necessary expedition thereafter in the unloading of the vessel. It does not appear that the salvors would not have been willing to take some chances in that direction, and it was at least due to the underwriters that the effort should have been made to have them do so. For a consideration the salvors' steamer, the "Corwin," would, doubtless, have been willing to remain by the "Sudden" until she was discharged, to give her a line in case of danger, and thus do away with any apprehended danger. That this excuse is, under the circumstances, a mere afterthought, is apparent.

The next suggested argument in answer to our objection that there was a breach of the sue and labor clause is that "the beach" at Nome was so crowded with freight that there was no convenient place for the cargo of the "Sudden," and some of the witnesses for plaintiff sought to create this impression. But the very simple answer to this is that the coming in of the "Sudden" in tow, instead of under sail, did not create any new condition upon the beach. Nor did the supposed absence of unloading room in anywise affect the discharge of the vessel's cargo, for it appears from the record that immediately after the sale at auction, with the aid of the saved lighterage plant, the whole of the cargo was successfully discharged and landed upon the beach. The difficulty suggested is wholly one of the imagination, and as with other similar suggestions, nothing but an afterthought. Captain Humphrey, the agent at Nome of defendant in error, had no difficulty in landing one hundred tons of the coal purchased by him at the sale. The fact that this coal was worth at least $60 per ton, the price at which he subsequently "sold" it to defendant in error, will, of course, explain the fact that space on the beach for that particular coal was found, although some of the witnesses would have us believe there was none there.

Lastly, to get away from the effect of their agent's neglect and wrongful conduct at Nome, it is said that banking and financial conditions were such that it would have been difficult to finance any possible arrangement with the salvors. In what way does this excuse the making of the stipulated for effort? The policy does not provide that the insured, or its agents, or servants,

shall succeed in saving the property, or reducing the loss, but that they shall make the effort to do so. In the absence of an effort to come to an arraugement with the salvors, how can it be said that no arrangement was financially possible? Captain Humphrey did successfully finance an arrangement under which the salvage contract as to the lighterage plant was carried out. And who can say that, for a sufficient consideration, the salvors would not have consented to the landing of the cargo and a sale thereof on shore, the salvage to be paid out of the cash proceeds of the sale? The 100 tons of coal, for which the agent of defendant in error paid only $400, would, we know, have brought, on shore, twenty times as much as the whole amount realized for the whole of the insured property sold on shipboard. An effort, at least, should have been made to secure this result, and the underwriter had contracted for this much, and for this much the insured had stipulated. It was almost a certainty that, sold on the vessel, by manifest lots, without opportunity on the part of buyers to examamine as to quantity, quality, or condition, and with no certainty concerning lighterage, the cargo would go as it did, for little or nothing. But with the saved lighterage plant in possession to use in getting the cargo from ship to shore, full value could have been obtained for the coal, lumber and other stuff not subject to sea damage. It would certainly have been to any proper interest which the salvors had to have such a sale, and the fair and necessary presumption is that they would have consented to an arrangement which, under an honest agreement, was to their pecuniary advantage. At any

rate, repeating what we have so often said, it was due to the underwriter that the effort should have been made to bring about such an arrangement as would have reduced the loss. The insured having indemnity against total loss only, cannot, by wilful omission to comply with his contract obligation, turn a partial into a total loss, and then look to the underwriter for payment. If he can so act, he can take advantage of his own wrong, and this is just what the law says cannot be done.

Not only were the agents at Nome of defendant in error derelict in the particulars already noticed, but, independently of their failure to seek to obtain some fair arrangement and settlement with the salvors under which delivery of the insured cargo would have been secured, or, at least, the loss to the underwriter reduced, they were guilty of a breach of the sue and labor stipulation in another particular. They could, when the insured cargo was sold, have bought it in for account of the insured, and under the circumstances they were bound to have done so. As we have seen, the coal and lumber alone were worth, and easily salable at Nome for twenty times more than the whole insured lot sold for; and this being so, the agent of defendant in error could have taken in the whole cargo and have sold so much thereof as might have been necessary to make good the purchase price. With one day's earnings of the lighterage plant, as we shall presently see, the purchase could have been made. He was quick to buy for himself, at $4 per ton, the 100 tons of coal which he subsequently sold to defendant in error for $6,000. How much more of the insured cargo the

same gentleman bought, we do not know. The defendant in error professes to be ignorant on this point, but in view of the value of the cargo in excess of the lump sum for which it was sold ($530), it should have been bought in. To have provided for this was something that an eighteen-year-old boy could have arranged. There was more than sufficient value in the lighterage plant, independently of all other resources, to have done whatever was necessary in this connection.

It may be, and possibly is the fact, that the agent of defendant in error at Nome did not deal honestly with the latter, and took advantage of his opportunity to feather his own nest. That there was crooked work is only too apparent. A simple recital of the facts demonstrates that there was a total disregard of the interests of defendant in error and its insurer. Captain Morine writing to Mr. Pennell, the Secretary of the company, expressed the whole situation tersely, saying:

"There has been some funny business done concerning the disposal of the 'Sudden' and cargo." (Trans., p. 166.)

It is no wonder that Morine thought that there had been some funny business, in view of some of the other facts which he communicated to the Secretary of the company. "Prices on lumber," he wrote, "keep up and fluctuate from $50 per M to $95" (Trans., p. 167); and later on, under date of August 4th, he says:

"The 'Corwin' people at once advertised and sold the 'Sudden' and cargo at auction. *Do not know who authorized them to do so*" (Trans., p. 170).

And again, under the same date:

"I instructed Captain Humphrey to purchase for the N. B. L. & T. Co. the entire lighterage outfit, including tents, house, coal, etc. I afterwards ascertained that all he had purchased for the N. B. L. & T. Co. was the anchors. He purchased 100 tons of coal at $4 per ton, and for the same coal he charged the 'Dorothy' $60 per ton. I know it to be a fact, that Capt. Humphrey managed the N. B. L. & T. Co's plant to his own advantage, which was not to the interest of our Co. I also requested him to put up at once our knock-down lighter, which he did not do. At this time she being worth $400.00 per day, a loss of 10 days, or $4,000.00."

Speaking of the lighterage outfit, Captain Morine placed its value at $20,000 (Trans., p. 155). It is no wonder that, in view of all these facts, he thought "there has been some funny business done concerning the disposal of the 'Sudden' and cargo."

And, in view of the facts referred to by Captain Morine, what is there left of the claim that the insured cargo of defendant in error had to be sacrificed because it was not possible to finance the small sum necessary to buy it in at the nominal figure ($530) for which it was sold; practically not more than one twentieth of its then cash value? With a lighterage plant afloat worth $20,000, a rental value for the lighter (not the knock-down lighter spoken of by Morine, but the one in use) of $400 per day, and an earning capacity for the launch of $50 for each round trip tow, and an earning capacity of an additional $400 per day for the knock-down lighter if put together, all of these being in the possession and under the control of the agent of defendant in error, it is said that the defendant in error was not in a position to negotiate with the salvors, nor to buy in the valuable property

covered by insurance at the pitiful sum for which it was knocked down. That with these undisputed facts upon the record the learned trial judge should, upon this point, have permitted the case to go to the jury was, we submit, wholly wrong.

Upon the trial it was claimed, that as to the failure of defendant in error prior to the sale to negotiate with the salvors an agreement as to the amount of their salvage charges and to arrange, if possible, therefor, that plaintiff in error cannot complain because, it is said, its duly authorized agent consented to the sale. It is a fact that one W. W. Gollin, who was sent to Nome by plaintiff in error and other marine underwriters, under a limited power of attorney which furnished no basis for the alleged consent, arriving at Nome while the sale was progressing did, in entire ignorance of the facts, and without any knowledge as to the value of the cargo, or as to the existence and possession of defendant in error of the lighterage plant, consented that the sale already commenced should proceed.

In relation to this, briefly stated the facts were these: Mr. Gollin went to Nome upon independent business of his own, and knowing that he was going, and that he had some insurance experience, certain underwriters, including plaintiff in error, requested him to act in certain enumerated matters for them. (Trans. of Record, p. 90). In this way he went for them and went under instructions (set forth at length in the Transcript, pp. 67 *et seq.*) conferring upon him the expressly limited power to act "in preserving," for the benefit of whom it might concern, insured vessels and cargoes

wrecked, stranded or damaged during the voyage to Nome, and to prevent losses which might thereby be made probable. (Trans. of Record, p. 67.)

Mr. Gollin landed on the beach at Nome while the sale of the "Catherine Sudden" was in progress, and being informed to that effect, requested that the sale might be temporarily suspended until he could look into the facts. (Trans. of Record, pp. 85–6.) This was assented to, and Mr. Gollin was informed of the accident to the "Sudden," her towage to Nome, that a survey had been held and the sale of the cargo recommended. At least, it is to be inferred that Mr. Gollin was informed to this extent, as in the argument upon behalf of plaintiff, which he injected into his testimony when on the stand (Trans. of Record, p. 87), he gave the Court and jury to understand as much. He also, he says, was shown the newspaper notices of the sale. (Trans. of Record, pp. 89–90). Having so satisfied himself that everything was as it should be, and with only this scant information in hand, he consented that the sale might go on. (Trans. of Record, p. 88.)

Now, in relation to all this, it is first to be observed that Mr. Gollin's instructions and powers did not cover a case of this kind. The power to preserve property, and Gollin's authority was expressly limited to this, (Trans. of Record, p. 67,) did not confer upon him the right to release the insured under policies issued by his principals from the performance of the obligations imposed by the sue and labor clause, nor to consent to unauthorized sales by salvage claimants.

In the next place, it does not appear, nor can it be

claimed, that anything done by Mr. Gollin in anywise changed the situation at Nome, or that the sale was in any way the result of his consent. In fact, the theory upon which defendant in error has proceeded from start to finish has been that the sale was forced by the salvors without regard to the wishes or rights of anyone, and it does not appear that if Mr. Gollin had protested against the sale the salvors would have paid the slightest attention to him. They humored him temporarily, and allowed him to fancy for a few moments that he was a participant in the proceedings. But it is quite apparent that he was handled with about the same ease that the merchandise was, and that nothing that he either said or did cut any figure in the proceedings. His somewhat warm approval of everything that was, in fact, done is quite apparently the result of his desire to justify what he himself did, or rather, perhaps, failed to do. But, as we have suggested, be this as it may, it is certain that Mr. Gollin's failure to do what he should have done, assuming that he had any power to act at all, there being no estoppel, did not justify the insured and its agents from performing their contract obligations.

Finally, upon this branch of the case, it is to be noted that Mr. Gollin's so called consent was based upon his understanding that the insured had not at the time any lighterage facilities. The fact that the insured was as able to get the cargo of the "Sudden" ashore as if she had come in under full sail was not communicated to him by Captain Humphrey, or by any of the salvors, and this most important bit of information we must assume was intentionally withheld. (Trans. of

Record, p. 97.) Of course, a consent so given and so obtained, if otherwise of any significance, cuts no figure whatever. And if the Court will take the trouble to read Mr. Gollin's testimony upon cross-examination (Trans. of Record, pp. 90–99), it will be satisfied that Mr. Gollin's acquaintance with the conditions at Nome, at the time he consented to the sale, was *nil*, and his acquaintance with the rights of insurers, insured, and salvors little better, and that, so far as his having any effect upon the sale goes, he might as well have been taking the temperature at the North Pole.

IV.

IF IT MAY BE SAID THAT THE SALE OF THE MERCHANDISE AT NOME WAS PROXIMATELY CAUSED BY THE INJURY TO THE "SUDDEN" SUFFERED IN THE ICE, THEN THAT INJURY WAS THE RESULT OF A RISK VOLUNTARILY ASSUMED, AND FOR LOSS FROM SUCH A RISK PLAINTIFF IN ERROR IS NOT LIABLE.

It is alleged in the answer that the "Sudden" with its cargo, while proceeding upon her voyage, after passing through and out of Umilak Pass into Behring Sea, met drift ice, and within twenty-four hours thereafter met with large fields of ice, and within forty-eight hours thereafter ran into and was surrounded with heavy ice, and thereafter, and while in said ice, was struck by submerged ice on her port bow and was thereby stove in, and that this was the accident and injury upon which this suit is based (Trans. of Record, pp. 34–5). It is

further alleged that plaintiff sailed the "Sudden" into the ice *"knowing full well that so to do endangered the safety of said vessel," and that so to do was not consistent with good seamanship, or with due and proper care,* and that plaintiff, when ice was encountered, in the exercise of proper care should have changed the course of said vessel and have sought open water, or a port of safety, until danger from ice between San Francisco and Nome had passed. (Trans. of Record, Ans. paragraph 5, pp. 35-6.) The evidence fully sustained this averment of the answer. (Test. John L. Panno, Trans., pp. 263-5.) The whole thing in a nutshell is contained in the Captain's statements (p. 264) that they (meaning himself and others who undertook to push through the ice) wanted to "market their goods," and that he "went right into it [the ice], still *fighting* to get up to Nome. He lay in the ice—stuck in it—until he got a lead, and *"kept working up through it"* (p. 264). Finally "he hit a piece of ice" (*id.*). "The vessel hit it and knocked her bow in" (*id.*). The moment he struck the ice there was a hole in his bow (*id.*). Then he put his colors down and signaled for help (*id.*). May a loss so suffered be said to to be a peril of the sea?

The ruling of the Circuit Court is, that an insurer is liable for a loss resulting from a peril intelligently and intentionally incurred, unless such intentional running of the foreseen and understood peril is itself *part of a corrupt design to destroy the insured property.* The trial judge so charged (Instruction 14, p. 332). We venture to submit that this doctrine is without a shadow of snpport in the law, is distinctly discountenanced by adjudicated cases, and is opposed to common sense and good morals.

Let us suppose a case. A, covered by insurance upon vessel and cargo sailing from San Francisco to Cape St. Lucas, has, at a particular point in the voyage, a choice between the open sea and a dangerous inland passage. He knows that the inland passage is dangerous, that there are uncharted reefs therein, and that he is running the serious risk of losing his vessel by going that way. But he wishes to observe what he may of the country at that point from the deck of his vessel, and so, while he has the open sea for a safe route, he unnecessarily, and to gratify a whim, attempts the inner passage and meets the fate which he had good reason to anticipate. Is the insurer in such a case liable? Is not the answer necessarily, no?

Independently of authority, we know that in these marine insurance contracts the law demands the utmost good faith, and a failure in this regard defeats the right of recovery. "Good faith," says McArthur (p. 15), "lies at the root and permeates every branch of a legitimate contract."

And what more marked breach of this good faith which the law insists upon can there be than to unnecessarily, or because of some purely selfish purpose, put an insured vessel and cargo up against a known, or reasonably to be apprehended, peril? The insurer undertakes to make good all losses resulting from sea perils, but not to reimburse the insured for losses caused by an intentionally reckless disregard of those precautions which common prudence dictates, and which he, understanding

the necessity therefor, wilfully refuses to take. And that is precisely what we have in the case at bar.

The owners of the "Sudden" dispatched her from San Francisco for Nome at a time when ice was to be met in the Behring Sea. The vessel was not sheathed or otherwise specially prepared for the ice, and her unfitness for that kind of navigation is evidenced by the fact that her first contact with ice put a hole through her bow. That she was not equipped for that character of work was substantially testified to by Captain Simmie, a witness for defendant in error (Trans., p. 284). The insured, of course, knew what was to be anticipated on that voyage, and without any direction, or precaution taken, likely to minimize the known risk, and the Captain, with his eyes wide open and the dangers apparent, deliberately put her into the ice and against the peril which resulted in the injury which is the basis of the claim now made against plaintiff in error. To have avoided the risks thus taken was a simple matter. The vessel could have put into Dutch Harbor, just out of Umilak Pass, until the Behring Sea was free from ice, a matter, we understand, of possibly a week or two. But the insured wanted to get to Nome "to market" the insured cargo, and so the vessel was headed into the ice and against her fate. If she did not get through the goods could not be sold at a profit, and so it was a good gamble to put her into the ice and take the chances. If she got through the goods could be sold at a profit; if she failed in the attempt, but without injury to the vessel, the goods were still on hand at what they were worth, and if she failed and sunk because of injury while in

and from the ice the insurers were in the gap for the loss.

The question at issue upon this point is not a wholly new one. There are a number of cases bearing upon it.

In *Williams* vs. *New England Ins. Co.*, 3 Cliff. 251; 29 Fed. Cas. No. 17, 731, the owners of an insured vessel attempted to put her across the bar at Hatteras Inlet. As in the case at bar, a proper purpose dictated the attempt. She struck on the bar and was wrecked. It was understood that the depth of water upon the bar was such as to make the attempted passage dangerous. It was held, that under the circumstances the loss was not within the protection of the policy. Speaking to the point we have now under discussion, the Court said:

"Authorities to prove that persons insured cannot recover for a loss occasioned by their own wrongful acts are hardly necessary, as the proposition involves an elementary principle of universal application. Losses may be recovered by the insured, though remotely occasioned by the negligence or misconduct of the master or crew, if proximately caused by the perils insured against, because such mistakes and negligence are incident to navigation and constitute a part of the perils which those who engage in such adventures are obliged to incur, but it was never supposed that the insured could recover indemnity for a loss occasioned by his own wrongful act, or by that of any agent for whose conduct he was responsible."

In support of the foregoing the Court cites:

Thompson vs. *Hopper*, 6 El. & Bl. 944;

Marsh, Ins., 376;

American Ins. Co. vs. *Ogden*, 21 Wend. 305;

Bell vs. *Carstairs*, 14 East. 374;

Cleveland vs. *Union Ins. Co.*, 8 Mass. 308.

In *Chandler* vs. *Worcester Mut. F. Ins. Co.*, 3 Cush. 328, the Supreme Court of Massachusetts, in an opinion written by Chief Justice Shaw, it is held, in line with the views expressed by Judge Clifford, that the misconduct of insured which will bar his recovery need not, as ruled by the Circuit Judge in this case, "be with the corrupt design of destroying the property"; and by way of illustration he puts this case:

"Suppose the insured in his own house sees the burning coals in the fireplace roll down on to the wooden floor, and does not brush them up, this would be a mere non feasance. It would not prove any intent to burn the building, but it would show a culpable recklessness and indifference to the rights of others. Suppose the premises insured should take fire, and the flames begin to kindle in a small spot, which a cup of water would put out, and the insured has the water at hand but neglects to put it on. This is mere non feasance; yet no one would doubt that it is *culpable* negligence, in violation of the maxim, *sic utere tuo et alienum non laedas.*"

And the general rule is that the insured is not indemnified against his own act, or want of action.

Parsons, Ins., Vol. I., p. 532 *et seq.*

And so the rule is stated by Emerson, cited by Mr. Parsons in support of his text.

"It is, then, certain," says that learned author, "that the insurers never answer for damages and losses which happen directly through the act or fault of the assured himself. It would be, in fact, intolerable that the assured should be indemnified by others for a loss of which he is the author. This rule is grounded upon first principles."

The principle of the common law, adds Mr. Parsons, in a note to the text, citing *Chandler* vs. *Ins. Co.*, *supra*,

(p. 532), seems to be the same. And to the same effect is the decision in

Am. Ins. Co. vs. *Ogden*, 20 Wend. 287.

And so it is ruled in England.

Thompson vs. *Hopper*, 7 Ellis & B. 937.

"The underwriter is not liable," says Mr. Phillips, (Sec. 1046), "to indemnify the assured for losses by the perils insured against directly incurred through the fraud or gross misconduct of the assured. A contract for indemnity in such case would be absurd, and so far as it related to a voluntary and intended loss, void at law."

The theory of counsel for defendant in error, upon which the Circuit Judge based his ruling, rests upon the general rule that the insurer is not exonerated from liability for a loss resulting from negligence because so brought about. But we respectfully submit that the learned counsel and the learned Circuit Judge have both overlooked the cases in which there has been mere negligence, or negligence pure and simple, which, under the decisions, is the remote cause of the loss, and the wilful and intentional omission to take a usual, ordinary and proper precaution, with a full understanding of the risk incurred by such failure so to do, which falling short of a corrupt design to destroy the property is, nevertheless, something more than mere negligence, and which, under all the authorities, bars the right of recovery upon the part of the insured. This distinction is noted by Mr. Phillips, who, stating the general rule and the qualification thereof, says:

"The underwriter is liable for losses by the perils insured against, though in consequence of the negligence

of the insured, *if it does not amount to gross negligence or wilful misconduct.*"

1 Phillips, Sec. 1046, a.

In the policy in suit the plaintiff in error insured defendant in error against "barratry of the master and mariners" (Trans., p. 19), and the effect of this special warranty is to exclude liability for such negligence upon the master's part as we have under consideration in this case.

Grim vs. *Phœnix Ins. Co.*, 13 Johns. 451, 458.

The doctrine of this case is approved by Mr. Parsons.

Parsons, Ins., Vol. I., p. 534 and note.

Section 2629 of the Civil Code of this State, which by an express stipulation of the policy is made a part of the contract between the parties (Trans., p. 22), is a statutory embodiment of the rule as we have stated it. That section in terms provides, that while an insurer is not exonerated by negligence upon the part of the insured or his agents, it "*is not liable for a loss caused by the wilful act of the insured.*" It is not questioned that this section of the Code is controlling, but it is, we believe, claimed that "the wilful act of the insured" referred to must include a "corrupt design" upon the part of the insured to destroy the property. And the rulings of the Circuit Court are based upon that theory.

Upon the other hand, we contend that the section is nothing more than the statutory expression of the law as laid down in the text-books and decisions to which we have referred.

In the absence of a clear intention to the contrary, and there being no inconsistency between the terms of the statute and the rule as given to us in the decisions, it would seem that no reason arises to hold that the statute means anything else. And in addition to this, the grammatical sense of the section leads to the same conclusion. If the lawmakers had intended to make the forfeiture of the policy depend upon an intention to destroy the property, would they not have said so? The natural way to express that idea would have been to phrase the section, "the insurer is not liable for a loss intentionally caused by the insured," or something equivalent to that. Why have left the intention in doubt, and why have clothed the legislative intention in language which, seemingly, does not mean the thing intended? A wilful act upon the part of the insured does not necessarily include a criminal intent. In the present case the insured of its own motion, and intending so to do, sent the vessel into the ice, and the loss resulted from its so doing. This was unquestionably a loss resulting from "the wilful act of the insured."

Nor was there any necessity at all for the provision, if what counsel for defendant in error contends for was intended, for, of course, the insurer would not be liable for a loss resulting from the intentional destruction by the insured of the insured property. Under no circumstances would such a loss be one from a peril of the sea. The apparent intention of the statute is to relieve the insurer from a loss by a peril of the sea brought about by an intentional assumption of the risk. Of course, such a risk can be recklessly taken, without a corrupt design

to destroy the insured property; and the statute is, in line with the common law, to cover such a case as this.

If the owner sees fit to run an unnecessary risk—to intentionally disregard the dictates of ordinary prudence—the loss ought to be his.

Of course we do not question that the insurer would be liable for a loss resulting from the remote negligence of the master, just as liability would exist if the insured himself were negligent within the meaning of the general rule. But if the act of the master from which the loss results amounts to misconduct within the qualification of that rule, it is the proximate cause of the loss, and the insurer cannot be held liable.

The answer in this case is drawn upon the theory that the negligence complained of was of that character which the authorities hold to be the *proximate*, as distinguished from that which is the remote, cause of the loss; and the evidence, we contend, abundantly established this claim, and if we are right in this, a verdict should have been directed in our favor.

V.

ERRORS IN THE GIVING OF INSTRUCTIONS.

(a) What was said under the last subdivision of this argument substantially covers our complaints in relation to the instructions which were given and those which were refused, concerning the voluntary risks taken by the insured in putting the vessel and her cargo into the ice. There is this, however, to be added. It is our contention that upon the evidence on this point a verdict

should have been directed for plaintiff in error. But it may be that the Court will be of the opinion that, upon the whole case, the question was one of fact for the jury. If the Court shall be of this opinion, and hold with us as to the law in such cases, then the question should have been submitted to the jury under proper instructions. In this view of the case the Court erred in giving Instruction 14 (Trans., p. 332), already referred to, and in refusing to give requested Instructions 38 and 39. These last two requests were as follows (Trans., p. 326):

"38. An insurer is not exonerated by the negligence of the insured, or of his agents, or others, but an insurer is not liable for the wilful act of the insured.

"If, from the evidence, you find that the plaintiff, as owner of the 'Catherine Sudden,' dispatched her upon the voyage to Nome, intending and with the understanding that she should sail into the Behring Sea without regard to the presence of ice therein, and that by reason of her construction and condition she was not fit to go into that sea and into the ice therein, and was likely to meet with the accident which in fact befell her, then, and in that case, your verdict must be for the defendant."

"39. In the navigation of the 'Catherine Sudden' from San Francisco to Nome the captain of said vessel was the agent and representative of the plaintiff, and if he put his vessel into the ice knowing that she was not fit to go into the ice and was likely to meet with the accident which in fact befell her, plaintiff is responsible for what he did, and if you find, as already stated, that the master under these circumstances put the vessel into the ice when he should not have done so, then, and in that case your verdict must be for the defendant."

We submit that upon the foregoing reasoning, and upon the authorities cited, each of the foregoing instructions should have been given.

(b) In its third instruction (Trans., p. 328), the Court charged the jury that the measure of damage for which plaintiff in error was liable for loss upon the lighterage plant was such proportion of the towage charge as the insurance ($3,000) was to the valuation ($3,000), to wit, the whole amount paid. We have in an earlier portion of this brief argued the fallacy of this view, and submit our objection to the instruction upon that argument.

(c) In the fourth instruction given the jury were told that the salvors' *claim* to the whole cargo had the legal effect to deprive the insured of the cargo permanently, *i. e.*, to made the loss total. We have heretofore herein referred the Court to the authorities to the contrary, including the *De Matos* case (L. R. 7 C. P. 570), in which it is said that this is absurd. The effect of this ruling was to take from the consideration of the jury the failure of the insured, its servants and agents, to comply with the sue and labor clause, and to take the case outside the authorities cited in our main argument, in which it is held that the loss, under such circumstances as we have here, was not from a sea peril, but was the result solely of the unauthorized sale. We rest our objection and exception to this instruction upon the argument under subdivision I hereof.

(d) The fifth instruction given (Trans., p. 329) is in line with the fourth, and goes a bowshot beyond. In this instruction a number of facts are assumed which have no shadow of support in the record, and from and upon these assumed facts certain legal deductions are drawn and based, which, we submit, have even less sup-

port in the law. It is assumed as a fact that the captain of the revenue cutter then at Nome was recognized as an authority to determine the question of salvage, that he acted as an arbitrator between the insured and the salvors, and as such gave the ship and cargo to the salvors, and from these imaginary facts it is held that the loss became, in law, a total loss for which plaintiff in error was liable, unless an adjustment as between the insured and the salvors was possible. Now, there is no evidence that the captain of the revenue cutter was recognized as an authority to determine the question of salvage, none that he acted as an arbitrator, and none that he gave, or assumed to give, the ship or cargo to the salvors. If there is any such testimony, counsel for defendant in error will doubtless be able to point it out. And, of course, if the assumed base upon which the legal theory of that instruction was built has, in fact, no existence, there is nothing for the theory to rest upon. The truth is that this instruction only puts in another form the wholly unsound view of the trial judge, that an unlawful seizure and sale by salvors is a peril of the sea.

(e) The seventh instruction given will be discussed in connection with certain instructions requested by plaintiff in error which were refused. Instructions eight to eleven are, we think, unsound in principle and unwarranted by the evidence, but they are in relation to a comparatively unimportant matter, and hence we pass them.

(f) Instructions twelve and thirteen have relation to the question of seaworthiness, and our exceptions thereto should be sustained upon the ground that, taken in con-

nection with instruction fourteen, they failed to submit properly our defense based upon the affirmative averment that the vessel was unseaworthy. This defense was specially pleaded (Trans., p. 34), and there was proof to sustain it. But the Court, apparently overlooking all this in instructions twelve, thirteen and fourteen, confused this distinct defense with the entirely separate one based upon the intentional assumption of risk in putting the vessel into the ice. Plaintiff in error had the right to a submission of the question of seaworthiness in such form that the jury could have passed on it intelligently.

VI.

ERRORS OF THE COURT IN REFUSING INSTRUCTIONS REQUESTED BY PLAINTIFF IN ERROR.

(a) We claim that the Court should have directed a verdict in our favor both as to the cargo and as to the lighterage plant, and these claims were embodied in requested instructions one to three. The refusal to give these we assign as error. The argument upon which this assignment of error is based is set forth at length in the earlier portion of this brief.

(b) Requested instructions four to eight (all of which were refused) were based upon our argument having relation to the lighterage plant. In and by these requests the Court was asked to charge the jury that, for the purpose of determining the proportion of the charge for towing the launch and lighters to Nome, the actual, and not the policy, valuation was to control. Our argu-

ment and the authorities upon this proposition are before the Court, and need not be repeated. In the eighth request the Court was asked to charge, that if the launch and lighters were, in fact, not in any danger of being lost, plaintiff in error was not liable for any portion of the towage cost, and as with the other requests mentioned, our argument and the supporting authorities are before the Court. We submit that it was plain error to take this question away from the jury.

(c) In the requests nine and ten we asked the Court to charge, that unless defendant in error had proven a total loss, it could not recover; that defendant in error was bound to prove a total loss, or fail. (Requests 9 and 10, Trans., pp. 313–314). These instructions, we submit, should have been given. The policy expressly provides against anything less than a total loss under the circumstances existing in this case, and such was the theory upon which the complaint was drawn.

(d) Requested instruction eleven (Trans., p. 314) should, we submit, have been given. It was to the effect that the sale at Nome could not be taken as a total loss, unless it was, in fact, the result of actual necessity, and could not have been avoided by any effort, or efforts, upon the part of the insured, and that the necessity for the sale was not established by proof that the salvors claimed the whole property as salvors, or insisted upon its sale. Plaintiff in error certainly had the right to this instruction.

> *De Matos* vs. *Saunders*, L. R. 7 C. P. 570;
> *Paddock* vs. *Com. Ins. Co.*, 84 Mass. 93.

The phrase "perils of the sea" in a policy of marine insurance extends only to cover losses really caused by sea damage or the violence ot the elements.

Murray vs. *N. S. Mar. Ins. Co.*, 10 N. S. R. 24.

This case and those next hereinafter cited are also in point in support of our argument under subdivision I of this brief that the sale at Nome under the claim of the salvors was not a loss from a peril of the sea.

And substantially to the same effect are:

Mercantile S. S. Co. vs. *Tyser*, 7 Q. B. Div. 73;
Scottish Marine Ins. Co. vs. *Turner*, 1 Macq. H. L. 334;
Moody vs. *Jones*, 4 B. & C. 394;
Moss vs. *Smith*, 9 C. B. 94;
Philpott vs. *Swan*, 11 C. B. (N. S.) 270;
Meyer vs. *Ralli*, 1 C. P. Div. 358.

Requested instruction twenty-one asked the Court to charge that the burden of proof was upon defendant in error to show that the sale at Nome was necessary. This request was also refused, and we assign this ruling as error.

(e) Requested instruction fourteen should, we submit, have been given. In that request we asked the Court to tell the jury that in determining whether or not the loss was total, they could not take into consideration the value of the salvage service, for the reason that such service had not at any time been fixed either by the parties or by any court, and that the value of such survice was not an issue in the case and could not be

collaterally determined therein. We submit that the instruction was proper, under the contentions of the parties and under the circumstances developed, and that the refusal to give it was error.

(f) Requests fifteen to twenty and twenty-one to twenty-three, inclusive (Trans., pp. 316–321), were based upon our argument having relation to the duties of the insured under the sue and labor clause, which, of course, it is unnecessary here to repeat, and should, we think, have been given. Under given instruction six (Trans., p. 330) the Court recognized the theoretical correctness of our contention in this regard, but that portion of the Court's charge is simply a colorless generality, and is not a fair substitute for the refused requests.

(g) Requested instruction twenty-four (Trans., p. 320) was expressive of the law and directly applicable to the facts in this case, and its refusal was most prejudical. Given instruction seven (Trans., p. 330), which purported to deal with the subject matter of refused request twenty-four, in effect, smothered and confused it. The Court in the instruction given does not say that Morine was without authority to appoint Humphrey, or that Humphrey, as substituted agent for the insured, was not obligated to do anything to lessen the loss to the authorities, but it certainly in effect conveys that impression. The law upon the contrary is, we submit, as expressed in the refused request.

> *Terre Haute, etc., R. B. Co.* vs. *McMurray*, 98 Ind., 358; 49 Am. Rep., 752.
>
> *8 Wait's A. & D.*, 50.

(h) Requests twenty-five to thirty (Trans., pp. 321–323) bore upon propositions already discussed, and were, we submit, expressive of the law as evidenced by the authorities already referred to.

(i) We ask the attention of the Court to requests thirty-one to thirty-four inclusive. In these we asked the Court to instruct the jury as to the effect of what Mr. Gollin did at the time of the sale, and we submit that the Court should have charged as requested, and that its failure to do so was, in its probable effect, most prejudicial.

(j) Requested instructions thirty-five, thirty-six and thirty-seven (Trans., pp. 325–326) are based upon the defense that the vessel was not seaworthy, and upon the evidence supporting that defense. Requests thirty-eight and thirty-nine (Trans., p. 326) have relation to the voluntary assumption of an unnecessary risk by putting the vessel into the ice. The Court confusing, as we read the charge given, these two distinct propositions, refused all our requests and gave its instruction No. 13 (Trans., p. 332). We urge the refusals and the giving of No. 13 as error. It was the right of plaintiff in error to have these two matters separately stated, and the mixing up the question of seaworthiness with the other one growing out of the voluntary putting of the vessel into the ice necessarily confused the jury. That the vessel was not fit to be navigated through the ice, and hence was unseaworthy, was one defence; that in putting her in the ice, knowing the risk run, and voluntarily assuming such risk, was another and independent de-

fence. The giving of No. 13 was, in effect, a withdrawal from the jury of the question of seaworthiness.

(k) There was evidence that the sale at Nome, which, it was claimed, had made the loss a total loss, had been judicially set aside (Trans. p. 253 and 121-2), and in our requests forty-one (Trans., p. 327) we asked the Court to charge that if this was so, then, as to the sold goods, there was no loss within the protection of the policy. This instruction with the others was refused. Should it not have been given? If that sale was judicially set aside, then there was no sale. In what way, then, was there a loss from a sea peril?

(l) The final instruction requested and refused had relation to a ruling made during the trial, and upon which we have assigned error. This ruling and the subsequent refusal to charge as requested in relation thereto will be discussed in the next subdivision of our argument.

VII.

THE COURT ERRED IN OVERRULING OBJECTIONS TO QUESTIONS ASKED THE WITNESS DAVIS, AND REFUSING TO STRIKE OUT PORTIONS OF HIS TESTIMONY.

Of the total insurance underwritten by the plaintiff in error in favor of defendant in error and others insured, owners of cargo upon the "Catherine Sudden," the greater portion was reinsured. The total original insurance was $13,000, but of this amount $12,000 was reinsured (Trans., p. 64). Plaintiff in error had only, there-

fore, $1000 dependent upon the result of this suit. The general agent of plaintiff in error at San Francisco was friendly to the claim of defendant in error, and wished to see defendant in error successful. He wished to see defendant in error get a verdict (Trans., p. 66). If Mr. Davis could have seen his way safely to pay the loss, he would have done so. But the reinsuring companies were of the opinion that the loss ought not to be paid, and with them plaintiff in error united in denying liability and in defending against the suit of which the writ of error herein is the outcome.

The record being as above stated, H. E. Pennell, the secretary of the defendant in error was asked:

"Did you have any conversations with Mr. Davis, the manager of this company, concerning the payment of the loss and the amount?" (Trans., p. 150.)

To that question the witness replied:

"I did; yes, sir." (Trans., p. 150.)

The witness continuing testified:

"I had those conversations with Mr. Davis from time to time in the way I have stated, telling him of the loss and asking him as to the mode of collecting under the policy, and as the different information was furnished and considered by Mr. Davis I continued, of course, on behalf of the company, to demand our insurance money. In response to this demand I was informed by Mr. Davis that he considered the demand of my company just, and that in all fairness we should receive our money under the policy. Then I asked him why he did not pay it. He said that he would like to pay it, and would pay it, if it were not for the fact that he had reinsured a certain amount of the risk that he carried, and if he paid the amount of our policy he would have in some way to get it from the reinsurers, for they had given him to understand that if he

paid it they would not pay him; and he said that he did not want to be out his money, as he would have to be, until he would, perhaps, have to sue his reinsurers to get his money, and while he felt that we should have it justly, for this reason he could not pay it." (Trans., p. 151.)

The question itself was unobjectionable by reason of the averment of the complaint that prior to the commencement of the action the loss had been adjusted (Trans., pp. 6, 13, 16). And, of course, plaintiff in error could not anticipate that under the safeguard of a legimate question there would be smuggled into the record the recital of Mr. Davis' individual opinions concerning the merits of the litigation, found in that portion of the answer commencing with the words "In response to this demand" &c., the necessarily injurious character of which is apparent. Our motion to strike out this matter was promptly made. The learned Circuit Judge expressed doubt as to the propriety of allowing Mr. Davis' opinions concerning the liabiliiy of his company to remain in the record, but because, apparently, of our insistence upon a ruling, a thing to which no proper exception can be taken, denied the motion to strike out.

At the close of the trial we requested an instruction (No. 42, Trans., p. 327) that the statement by Mr. Davis "that in his opinion the defendant was liable" &c. should be disregarded, but this request was refused. Of course, the letting of this statement of Mr. Davis remain in the record was to give the jury to understand that the opinion thus expressed was something that could be considered in reaching their verdict.

It would seem that argument upon these rulings would be but a useless waste of the time of this Court. We leave it to the ingenuity of counsel upon the other side to suggest some possible support therefor.

VIII.

A companion ruling to the one last considered is set forth in our fifty-ninth specification of error herein (ante, p. 36). The argumentative answer of Mr. Davis, to which our motion to strike out, as therein set forth, was addressed, was upon its face intended to aid defendant in error, and it can hardly be doubted that it had that effect.

IX.

The Court permitted counsel for defendant in error, over our objection, to ask the witness Davis whether or not, in stating to the representatives of defendant in error that the proofs of loss presented by the latter were sufficient, the fact that it had been stated that Mr. Gollin had consented to the sale at Nome had any effect on his judgment. It is difficult to perceive the connection between these two things, but by the ruling of the Court in permitting the witness to answer, as he did: "Yes, sir, for the reason that I have known Mr. Gollin ever since I have been in the insurance business, and I have great faith in his ability," the jury were, in effect, told that this was material, and it is fair to presume that, having been given to so understand, they gave Mr. Davis' high opinion of Mr. Gollin due consideration in reaching their verdict.

Throughout the foregoing argument we have proceeded upon the theory that defendant in error, as to any item upon which a total loss had not been proven, could not, as to such item, recover. The warranty of the policy bearing upon this is as follows (Trans., p. 20):

"3. All merchandise not excepted under the following memorandum clause (this clause has no bearing upon the question) is hereby warranted by the insured Free From Particular Average and Partial Loss, unless occasioned by stranding, sinking, fire, collision, or other extraordinary peril hereby insured against, and amounting to fifty per cent. or more on the sound value of the whole shipment at the port of delivery, and all such loss shall be settled on the principles of salvage loss, with benefit of salvage to the insurers."

Under this warranty it will be seen that, under a properly framed pleading, and upon sufficient proof, a loss less than total, if of a kind and from a cause insured against and over fifty per cent., would be within the protection of the policy. But the complaint, as to each class of property covered, alleges only a total loss, and there is no proof of any loss less than total; and hence, unless, in law, the loss to defendant in error was, under the circumstances, a total loss, there is no evidence upon which a recovery for any lesser sum could have been maintained In other words, there is no evidence upon which the jury could have measured the amount of a loss less than total. This is unquestionably true as to the merchandise item, and it is not pretended that the lighterage plant was, by reason of the "Sudden's" contact with the ice, injured at all; and the Court expressly so charged, saying (Trans., p. 328):

"3. It does not appear that any injury or damage resulted to the lighterage plant from the accident to the 'Catherine Sudden,' or that the plaintiff suffered any loss or damage as to said plant within the protection of the policy, except in so far as plaintiff was compelled to pay salvage for the towing of said lighterage plant from the place of the accident to Nome."

Our contention then as to the lighterage plant, that we were liable only for a total loss, is based upon the theory sustained and accepted by the Court that there was not, as to that portion of the insured property, by reason of what happened to the "Sudden" in the ice, any possibility of loss from any of the specified causes under which plaintiff in error was to be liable for a partial loss above fifty per cent. And if this be so it follows that there was not under the policy any partial loss liability and hence the authorities cited by us upon this branch of the case are in point.

Upon the whole case we respectfully submit that the judgment should be reversed.

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